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REPORTS
OF
CASES IN LAW AND EQUITY,
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF IOWA.

E. O. EBERSOLE,
REPORTER.

VOL. VII,
BEING VOLUME LXV OF THE SERIES.

BANKS & BROTHERS, LAW PUBLISHERS,
NEW YORK: No. 144 NASSAU STREET.
ALBANY, N. Y.: 473 AND 475 BROADWAY.
1886.

Entered according to an Act of Congress, in the year 1886, for the State
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REPORTS
OF
Cases in Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA,

AT
DUBUQUE, OCTOBER TERM, A. D. 1884,

IN THE THIRTY-EIGHTH YEAR OF THE STATE.

PRESENT:

HON. JAMES H. ROTHROCK, CHIEF JUSTICE.	
" JOSEPH M. BECK,	} JUDGES.
" AUSTIN ADAMS,	
" WILLIAM H. SEEVERS,	
" JOSEPH R. REED,	

ALBERTSON V. KRIECHBAUM, SHERIFF.

1. **Criminal Law: INFORMATION: CHANGE OF VENUE: STATUTE CONSTRUED.** In section 4671 of the Code, relating to changes of venue in criminal cases triable in justices' courts, the clause providing that the justice before whom the cause is commenced shall transmit the papers, etc., "to the next nearest justice in the county against whom none of the *above* objections exist," refers only to the objections enumerated in that section, and not to the objections named in section 4670, which are required to be made by affidavit as a ground for a change of venue. Accordingly, where the defendant included in his affidavit for a change an allegation that he could not obtain justice before the other justice of the same township, he being the next nearest justice, such allegation

65	11
92	259
65	11
96	377
65	11
126	459

 Albertson v. Kriechbaum, Sheriff.

was properly stricken out on motion, and, there being no legal objection against said next nearest justice, the cause was properly sent to him, and he thereby acquired jurisdiction thereof.

2. —: JURISDICTION: INFORMATION OR INDICTMENT: MEASURE OF PENALTY: IMPRISONMENT IN DEFAULT OF FINE AND COSTS: LIQUOR LAW. Where a statute provides that for the violation thereof a fine shall be imposed, and that the convict shall pay the costs of prosecution, and that, in default of such fine and costs, he shall be imprisoned for a certain time, the imprisonment is no part of the penalty, but only a means of collecting the penalty and costs; and so, where the fine provided does not exceed \$100, the cause may be tried on information in justice's court, under section 11, art. 1, of the constitution, although the time for which the convict may be imprisoned in default of payment of fine and costs may exceed thirty days. Accordingly, a justice of the peace has jurisdiction of the "first offense" contemplated in section 11, Chap. 143, Acts of Twentieth General Assembly, in relation to keeping and selling intoxicating liquors.

Appeal from the order of Hon. A. H. Stutsman, Judge of the District Court of the first Judicial District, in habeas corpus proceedings.

FRIDAY, OCTOBER 24.

On the fourth day of August, 1884, plaintiff presented his petition to Judge Stutsman, in which he alleged that he was illegally restrained of his liberty by the defendant.

On this petition a writ of *habeas corpus* was issued, and, in obedience to its command, plaintiff was brought before the judge, and a hearing was had, which resulted in an order remanding him to the custody of defendant. And from this order he appeals.

S. L. Glasgow, J. M. Virgin, Hall and Huston and Bills & Block, for appellant.

Smith McPherson, Attorney-general, and Newman & Blake, for appellee.

REED, J.—The evidence introduced on the hearing before the district judge establishes the following facts: An information was filed before B. F. Stahl, a justice of the

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peace in Des Moines county, in which plaintiff was accused of the crime of keeping intoxicating liquors, with intent to sell the same contrary to law. The justice issued his warrant for the arrest of the accused, and he was arrested thereon, and brought before the justice. He thereupon filed his affidavit for a change of venue, alleging therein that he could not obtain justice before said Stahl; also, alleging that he could not obtain justice before certain other justices of the peace of the county, who were named in the affidavit, and, among them, Lewis Conley, the other justice in the same township in which Justice Stahl resided.

The attorney for the state filed a motion to strike out of the affidavit the allegation with reference to the other justices, which motion the justice sustained. The change of venue was then granted, and the cause was sent to said Justice Conley, and the accused was taken before him by the officers who had him in custody. He then filed a motion to dismiss the case, on the ground that said justice did not have jurisdiction to try the same, he not being the next nearest justice to Justice Stahl, against whom no legal objections existed, and that the action of Justice Stahl in sending the cause to him for trial was unlawful. This motion was overruled. The accused then pleaded not guilty, and a trial was had, in which he was found guilty, and he was adjudged to pay a fine of \$100, and the costs, taxed at fifty-two dollars and seventy cents; and it was ordered that, in default of immediate payment of said fine and costs, he stand committed to the county jail for forty-five days, unless the fine and costs be sooner paid or satisfied according to law.

I. Plaintiff contends that the action of Justice Stahl in striking out of the affidavit the allegation with reference to the other justices named therein, and sending the cause to Justice Conley for trial, was unlawful, and that the latter did not have jurisdiction to try the cause, and, as a consequence, his judgment and orders therein are void.

1. CRIMINAL
law: Inform-
ation: change
of venue:
statute con-
strued.

The right of the defendant in a criminal case in justice's court to a change of venue, and the practice in such proceedings, are established and described by sections 4670 and 4671 of the Code. These sections are as follows:

"Section 4670. If a change of venue be applied for, an affidavit must be filed, stating that the justice is prejudiced against the defendant, or is of near relation to the prosecutor upon the charge, or the party injured or interested, or is a material witness for either party, or that the defendant cannot obtain justice before him, as affiant verily believes.

"Section 4671. If such affidavit be filed, the change of venue must be allowed, and the justice must immediately transmit all the original papers, and a transcript of his docket entries in the case, to the next nearest justice in the township, unless said justice be a party to the action, or is related to either party by consanguinity or affinity within the fourth degree, or where he has been attorney for either party in the action or proceeding; and in such case the justice before whom such action or proceeding is commenced shall transmit all the original papers, together with a transcript of all his docket entries, to the *next nearest justice in the county, against whom none of the above objections exist*, who may require the defendant to plead; * * * * but no more than one change of venue in the same case shall be allowed."

The position of counsel for plaintiff is that, by the provision in the latter part of section 4671,—that "the justice before whom the action or proceeding is commenced shall transmit all the original papers, together with a transcript of all the docket entries, to the next nearest justice in the county, against whom none of the above objections exist," reference is had to those objections which are enumerated in section 4670, as causes entitling the party to a change of venue. We think it very clear, however, that the language of the section does not admit of this construction. The object of the section is to designate the justice to whom the cause shall be

sent when a change of venue is taken from the one before whom it is commenced. The preceding section enumerates the causes which are grounds for such change, and provides that, when a change is applied for, an affidavit must be filed, showing the existence of one or more of said causes. All of these grounds for a change, however, relate to the justice before whom the action or proceeding is commenced. The first provision of section 4671 is that, when such affidavit is filed, the change must be granted, and the cause must be sent to the next nearest justice in the township, unless he be a party to the action, or is related to either party to it by affinity, or consanguinity within the fourth degree, or when he has been attorney for either party in the action or proceeding.

It is then provided that in "such case,"—that is, in case it is shown that any of the objections just enumerated exist against the next nearest justice in the township, the case shall be sent to the next nearest justice in the county, against whom none of such objections exist.

This is the clear meaning of the language of the section, and there is no rule of construction under which the provision in question can be made to refer to the objections enumerated in section 4670, as grounds for a change from the justice before whom the action is commenced.

II. It is next contended that the crime of which plaintiff was accused in the information is one of which he could be convicted only upon indictment, and that the justice did not have jurisdiction to try and determine said accusation, and that the judgment and order entered by him are therefore void. The proceeding was under section 11, Chap. 143, Acts of the Twentieth General Assembly. The section, so far as it relates to the offense of which plaintiff was accused, is as follows:

2. —: jurisdiction: information or instruction: measure of penalty: imprisonment in default of fine and costs: liquor law.

"No person shall own or keep, or be in any way concerned, engaged, or employed in owning or keeping, any intoxicating

Albertson v. Kriechbaum, Sheriff.

liquors, with intent to sell the same within this state, or to permit the same to be sold therein, in violation of the provisions hereof, and any person who shall so own or keep, or be concerned, engaged, or employed in owning or keeping, such liquors, with any such intent, shall be deemed, for the first offense, guilty of a misdemeanor, and, on conviction for said first offense, shall pay a fine of not less than fifty nor more than one hundred dollars, and costs of prosecution, and shall stand committed to the county jail until such fine and costs are paid, and, in default of such fine and costs, he shall not be entitled to the benefits of chapter 47, title 25, of the Code, until he shall have been imprisoned sixty days."

The position of counsel is that, under this section, a punishment may be imposed for the offense of which plaintiff was accused, which is in excess of the jurisdiction of a justice of the peace, as the same is defined by section 11, article 1, of the constitution of the state. This section is as follows:

"All offenses less than felony, and in which the punishment does not exceed a fine of \$100, or imprisonment for thirty days, shall be tried summarily before a justice of the peace, or other officer authorized by law, on information under oath, without indictment or the intervention of a grand jury, saving to the defendant the right of appeal; and no person shall be held to answer for any higher criminal offense, unless on presentment or indictment by a grand jury."

Under the section of the statute quoted above, a fine of not less than fifty nor more than one hundred dollars is to be imposed on the defendant on conviction, and the costs of the proceedings are to be taxed against him, and he is to stand committed to the county jail until such fine and costs are paid; and he cannot avail himself of the benefits of the statute, which provides for the liberation, on certain specified conditions, of defendants who have been committed for the non-payment of fines imposed upon them, (Code, § 4611,) until he has been imprisoned sixty days. And the claim is that the costs which are taxed against the

Albertson v. Kriechbaum, Sheriff.

defendant, and the imprisonment to which he is subjected in case of default in the payment of the fine and costs, constitute part of the punishment for the offense, and hence that he can be held to answer therefor only on indictment.

But we think this claim is not well founded. The costs which, under the statute, may be taxed to the defendant, are such as accrue in the proceeding for its enforcement against him. These costs are merely incidental to the proceeding. They are collected for the compensation of the public officers who render services in the cause, and the witnesses who give testimony in it. But they in no proper sense pertain to the penalty which may be imposed on the defendant by the judgment of the court, by way of punishment for his violation of the statute. The sum which may be exacted from him as punishment for his criminal misconduct is that definite and certain sum called a fine, which the court is empowered by the statute to impose upon him. That is the sum which he is compelled to pay to the state as the penalty of its violated law, and the costs are exacted as a mere incident of the proceeding, to enforce that penalty against him, and for the purpose of compensating those who render services in that proceeding.

The power to tax the cost of the prosecution against the defendant exists independently of the statute in question. It has been the uniform practice of the courts of this state, in criminal cases, on the conviction of the defendant, to tax the costs of the prosecution to him; and the power to do this is not questioned. The only effect of the statute, then, on the powers of the courts with reference to the taxation of costs, is to empower them to commit the defendant in case of his refusal to pay such costs as may be taxed against him. The provision with reference to the imprisonment of the defendant is, that he "shall stand committed until such fine and costs are paid." This does not empower the court to imprison him in punishment for his offense.

The provision in the judgment for his commitment is con-

ditional and contingent. It can only be enforced in case of his refusal to perform the pecuniary judgment against him. Its office, like that of the provision for execution in civil judgments, is to afford the means for the enforcement of the judgment. The imprisonment is not imposed in lieu of the fine. Neither does it operate to satisfy the judgment for the fine and costs, however long it may be continued. See *The State v. Jordan*, 39 Iowa, 387; *The State v. Anwerda*, 40 Id., 151. The conclusion that the only punishment prescribed by the statute for the offense of which defendant was accused is the fine which the court is empowered to impose, follows necessarily, we think, from the terms of the statute, and this view is well sustained by the authorities: *Brown v. The People*, 19 Ills., 613; *Ex parte Bollig*, 31 Id., 88; *Commonwealth v. Carr*, 11 Gray, 463; *Commonwealth v. Burns*, 14 Id., 35; *Estep v. Lacy*, 35 Iowa, 419; *Re Sweatman*, 1 Cowen, 144; *Kane v. The People*, 8 Wend., 203.

We think, therefore, that the order of the learned district judge is correct, and it is

AFFIRMED.

WILSON V. PALO ALTO COUNTY.

1. **Practice in Supreme Court: EVIDENCE: DEFECTIVE RECORD: WAIVER BY APPELLEE.** Where appellant has filed an abstract which purports to contain all the evidence offered on the trial below, and appellee files an additional abstract, correcting appellant's abstract by striking out portions of it, and adding evidence which it claims was given on the trial, but omitted from appellant's abstract, appellee, by so doing, admits, inferentially at least, that the record, as thus amended, contains all the evidence, and he cannot afterwards, on motion, have the evidence stricken out on the ground that it was not certified or preserved by bill of exceptions. See opinion for cases cited and followed.
2. —: **LAW CASE: POINT NOT RAISED BELOW NOT CONSIDERED.** On appeal to this court in an action by ordinary proceedings, no question will be considered which was not presented and ruled upon in the trial court.

65	18
103	197
65	18
142	549

Wilson v. Palo Alto County.

3. **County: CLAIM AGAINST: ACCEPTANCE OF PART ALLOWED: ACTION FOR RESIDUE.** Where a claim against a county consists of several items, some of which are allowed in full, and others wholly rejected, by the board of supervisors, and the claimant, with full knowledge of these facts, accepts the sum allowed, he is not thereby precluded from maintaining an action against the county for the residue of his claim. *Wapello Co. v. Sinnaman*, 1 G. Greene, 413, and *Brick v. Plymouth Co.*, 63 Iowa, 462, distinguished.

Appeal from Clay District Court.

FRIDAY, OCTOBER 24.

ACTION on account for a balance which plaintiff alleges is due him for lumber and building materials sold and delivered to the defendant. Answer in denial; also, that said lumber and materials were sold and delivered to Burdick & Goble, who had a contract with defendant to furnish the material and do the work in building a court house for defendant, and that defendant never undertook to pay plaintiff for said lumber, nor became liable to pay for the same; also, that plaintiff presented his account for said lumber and material, amounting to \$1,811.07, to defendant's board of supervisors, and that said board of supervisors allowed plaintiff thereon the sum of \$1,398.80, and rejected the balance of said claim; and that plaintiff, with knowledge of these facts, accepted and received the amount so allowed.

There was a trial to a jury, and, when plaintiff had introduced his evidence and rested, the court directed the jury to find for defendant, and a verdict was returned accordingly, on which judgment was rendered against plaintiff for costs, and he appeals.

T. W. Harrison, for appellant.

Soper, Crawford & Carr, for appellee.

REED, J.—Appellee filed in this court a motion to strike from the abstract and transcript what purported to be the

 Wilson v. Palo Alto County.

1. PRACTICE
in supreme
court: evi-
dence: defec-
tive record:
waiver by
appellee.

evidence in the case, and to affirm the judgment, on the ground that the evidence was not certified or preserved by a bill of exceptions. A skeleton bill of exceptions was signed by the trial judge, and filed in the case, in which the clerk is directed to insert, in the proper places, the testimony of the witnesses who were examined, and the documentary evidence which was introduced on the trial. But there is no direction as to the source from which the evidence is to be procured. The clerk is told simply to insert the testimony of the witnesses, but is not directed as to the source from which he may obtain information as to what the testimony was, and appellee's point is, that there is such an entire want of certainty as to the identity of the evidence embodied in the transcript, with that given on the trial, that we cannot consider it. We are of opinion, however, that appellee is not now in position to take advantage of this question.

Appellant filed an abstract containing, as he alleges, all the evidence introduced on the trial. Thereupon defendant filed an additional or amended abstract, correcting appellant's abstract, by striking out portions of it, and adding evidence which, it claims, was given on the trial, and not included therein. Having filed this amended abstract, it thereby admits, inferentially at least, that the two papers contain all the evidence given on the trial, and he will not now be permitted to deny this. The rule in this respect is well settled by the cases heretofore decided. See *Starr v. City of Burlington*, 45 Iowa, 87; *Cross v. The B. & S. W. R. Co.*, 51 Id., 683; *Wells v. The B., C. R. & N. R. Co.*, 56 Id., 522; *Roberts v. The Leon Loan & Abstract Co.*, 63 Id., 76. The motion is, therefore, overruled.

II. The pleadings and evidence show that defendant contracted with Burdick & Goble for the erection of a court house, at Emmetsburg. The contractors undertook to furnish the material for said building, and do the work in erecting the same, for a stipulated price. They contracted with plaintiff,

who is a dealer in lumber, for the purchase of the material necessary for the erection of said building. After a large amount of lumber had been delivered by plaintiff on the ground where said building was to be erected, a contract was entered into by Burdick & Goble with the building committee, appointed by the board of supervisors of the county, which had charge, for the county, of the work of erecting said court house, for the sale of said lumber to the county. This contract was in writing, and \$450 is the sum named therein as the consideration paid by the county for said lumber, although its real value was much greater than that. The following provision was added to the contract, and was signed by the members of the building committee:

"It is hereby agreed and understood that, so far as said J. J. Wilson is concerned, the above bill of sale is not an absolute evidence of payment, by the county, for the lumber bought of him, but only for such portion as may be paid him, and it does not preclude said Wilson from recovering, from the proper parties, all amounts that may, from time to time, be due him for lumber sold to said Burdick & Goble, or either of them."

The \$450 named in the contract was paid plaintiff by the building committee at the time the contract was executed, and subsequently a number of other payments were made by the committee on said lumber.

Plaintiff finally presented an account for the balance which he claimed was due him for said lumber, to the board of supervisors. This account was itemized, and the balance claimed by plaintiff thereon was \$1,811.07. One of the items of the account was \$61.67 for interest. This, and a number of other items of the account, were rejected by the board, and the balance, amounting to \$1,398.80, was allowed. Plaintiff afterwards accepted the amount allowed, and he knew at the time he accepted it that the other items of the account had been disallowed. But he testified that he objected to receiving the amount allowed, in full payment of the account, and that

the committee stated to him that if he did not accept it as full payment he had his remedy, and that he accepted the amount as part payment only, and receipted for it as such, and that this was stated to the committee at the time he received it.

When plaintiff had introduced his evidence and rested, defendant filed a motion in writing, asking the court to direct the jury to return a verdict for it. This motion was on the "ground that the evidence shows that plaintiff presented his claim to the county; that the same was audited and allowed at a less sum than that which was claimed; that he accepted and received the amount audited and allowed; and that this action is brought for the difference between the amount allowed and accepted and the amount claimed, upon an unliquidated demand."

As stated in the statement of the case, this motion was sustained, and a verdict for defendant was returned by the jury. Appellee insists that the action of the court in directing the verdict ought to be sustained on two grounds, viz.: *First*, On the ground stated in the motion; and, *Second*, On the ground that the evidence given on the trial shows that the defendant has fully paid the consideration which, by the written contract, it agreed to pay for said lumber, and that said contract does not create any obligation by defendant to pay any sum greater than the amount named therein, and that the evidence shows that plaintiff, in fact, sold said lumber to Burdick & Goble, who contracted to furnish the same for the erection of said court house.

But it is very manifest, we think, that defendant is not entitled to have this second question considered by this court. It is not raised by the motion, and was never passed upon by the district court. The motion required the district court to determine whether the acceptance by the plaintiff of the amount allowed by the board of supervisors on his claim barred his right of action for the items of the account which were disallowed. And that is the question which the district

2. —: law
case: point
not raised be-
low not con-
sidered.

court decided. But the consideration of the second ground here urged in support of the order of the court would require an interpretation of the written contract between the parties, and a determination of the effect of its terms and conditions—a question which was neither presented to or passed upon by the district court. And, when sitting as a court for the correction of errors, we can consider only such questions as were passed upon by the court whose judgment we are reviewing. We will, therefore, in determining the case, confine ourselves to a consideration of the question raised by defendant's motion.

This court has heretofore had occasion, in the cases of *Wapello Co. v. Sinnaman*, 1 G. Greene, 413; *Fulton v. Monona Co.*, 47 Iowa, 622; and *Brick v. Ply-*

3. COUNTY: claim against: acceptance of part allowed: action for residue. *mouth Co.*, 63 Id., 462, to consider the effect of the acceptance by one having a claim against a county of an allowance of a portion thereof, on his right of action for the portion rejected or disallowed. In the *Wapello* and *Plymouth* county cases, it was held that the parties, by their acceptance of the amounts allowed them on their claims, were precluded from maintaining actions for the portions disallowed, while in the other case the holding was that plaintiff was not barred of her right of action as to the portion of her claim which was disallowed, by her acceptance of the amount allowed her thereon. The apparent want of harmony in these holdings, however, is accounted for by the difference in the facts of the cases. In the former cases, the claimants accepted the amounts allowed on their claims without objection, and with full knowledge that a portion thereof had been rejected; while, in the latter, plaintiff did not know, when she accepted the amount allowed, that any portion of her claim had been disallowed. The general principle on which the cases were decided, and, as we think, upon which all others involving like states of fact must be decided, is this: Unless the party has accepted the amount allowed on his claim, under such circumstances as that a settlement

or compromise of matters in dispute between the parties can be inferred therefrom, he is not precluded thereby from maintaining his action for the portion disallowed.

If the board of supervisors, in passing upon a claim against the county, should allow a certain per cent of the whole amount claimed, and refuse to allow the remainder thereof, they would thereby say to the claimant, in effect, that his claim, as made by him, was regarded as unjust or invalid, but that they were willing to pay the amount allowed in settlement or compromise of it; and if, with full knowledge of the action which had been taken on his claim, the claimant should, without objection, accept the amount allowed, this should be regarded as an acceptance by him of the terms of compromise offered, and he ought to be precluded from maintaining an action for the portion disallowed. But, if the claim should include some items about which there was no dispute between the parties, and others that were denied, and the former should be allowed and the latter rejected, we see no reason for holding that his acceptance of the amount which was not at all disputed should bar his right of action for the items which were denied and disallowed. It would be competent, also, for the parties to agree that the acceptance of the amount allowed should not be conclusive of the rights of the claimants as to the portion of the claim disallowed. The evidence in this case, as stated above, shows that the portion of plaintiff's claim, disallowed by the board of supervisors, was certain items of the account which were stricken out of it by the building committee. The portion allowed included the remaining items, just as they were claimed by plaintiff. They do not seem to have been in any manner disputed or questioned by defendant. His acceptance of the amount allowed them does not necessarily preclude him from maintaining an action for the amount of the items disallowed. We think, also, that the evidence had some tendency to show an agreement by the parties, that plaintiff's acceptance of the amount allowed should not conclude his rights as to the other items.

 Heinrichs v. Terrell.

We think, therefore, that the district court erred in sustaining the motion and directing the jury to find for defendant, and the judgment is

REVERSED.

 HEINRICHS V. TERRELL.

1. **Trespass: EVIDENCE OF TITLE: DEFECTIVE DEED.** In an action for trespass on land, a deed which constitutes a necessary link in the chain of plaintiff's title is admissible in evidence, although the description of the premises is defective; for the defect may be cured by other competent evidence.
2. **Practice: ORDER OF TESTIMONY: DISCRETION OF COURT: EXAMPLE.** The order in which evidence should be introduced is largely in the discretion of the court, and the admission of material evidence at any time during the trial cannot ordinarily be said to constitute error; and so, ordinarily, in an action for trespass on land, it is not error to admit in evidence a deed of the premises made by another to plaintiff, although plaintiff has not as yet shown that such other person had any title.
3. **Trespass on Land: PROOF OF TITLE NECESSARY TO RECOVERY.** Where plaintiff in an action for trespass on land does not allege that he was in possession, but relies wholly upon his ownership of the land, he must show, in order to recover, that he or his grantors obtained title from the general government.
4. **Pleading: INCONSISTENT DEFENSES: EFFECT OF ADMISSIONS.** Under § 2710 of the Code, a defendant may plead inconsistent defenses in the same pleading; and admissions made in one defense are not to be construed as affecting a different and inconsistent defense. See *Barr v. Hack*, 46 Iowa, 308.
5. **Title to Real Estate: EVIDENCE: DEFECTIVE DEED: AUDITOR'S PLAT-BOOK TO AID.** The county auditor's plat book, contemplated by § 1950 of the Code, is not competent evidence to aid the defective description in a deed, by identifying the description and showing that it was well known,—it not being a published map or chart, within the meaning of § 3653 of the Code, nor a certified copy of any record, entry or paper belonging to a public office, as contemplated in § 3702 of the Code.
6. ———: **DIVISION LINE AGREED UPON: POSSESSION: STATUTE OF LIMITATIONS.** Where a division line is agreed upon by persons owning adjoining real estate, and possession is taken in accordance with such agreement, such possession must be regarded as adverse from the time

65	25
83	396
65	25
107	552
65	25
111	658
65	25
121	468
65	25
140	28

it is taken, and, if so held and continued for the period of ten years next succeeding, it will ripen into a perfect title, binding upon the parties and those claiming under them; and when such title is once acquired, continued actual possession is not necessary to preserve it.

Appeal from Johnson Circuit Court.

FRIDAY, OCTOBER 24.

THE petition states that the plaintiff is the owner of the following described real estate: "Twenty acres off the north side of twenty-five acres off the south side of lot No. seven, (7,) of section No. thirty-three, (33,) township No. eighty, (80,) north, of range No. six west," and that the defendant entered thereon, and "trod down the grass and dug holes in the ground," to the damage of the plaintiff.

The defendant denied the allegations in the petition, and pleaded that he owned the premises on which the alleged trespass was committed, and that he had been in the actual possession thereof, under color of right and claim of title, for more than twenty years prior to the alleged trespass. The defendant further pleaded that in 1860 one Crum owned the premises described in the petition, and that he and Crum agreed that a certain stone was one of the true corners of said premises, and that Crum relinquished all claim to the land lying east of a line extending south from said stone, and that ever since said time the defendant has been in possession of the land east of said line under a claim of right and title. Trial by jury, verdict and judgment for the plaintiff. The defendant appeals.

Milton Remley, for appellant.

Boal & Jackson and *Robinson & Patterson*, for appellee.

SEEVERS, J.—I. The Iowa river runs through section thirty-three, and, as we understand, the section was subdivided into lots by the government. For the purpose of determining certain questions in relation to the admission of evidence, it will be assumed

1. TRESPASS:
evidence of
title: defective deed.

that the plaintiff owns lot seven, and the defendant lot six. The latter abuts on the former on the east. The real controversy relates to the boundary line between these two tracts of land.

The plaintiff, however, under the issue, assumed the burden of proving title in himself. For this purpose he offered in evidence a deed from John Buck to William Crum, describing the following premises: "Twenty off the north end of lot No. 1, in section thirty-three, township 80, range 6, joining on the south end on five acres of land belonging to Jacob Mustcher." To the proposed evidence the defendant objected, on the ground that the land described in the deed was not the same as that described in the petition. The objection was overruled, and the deed admitted in evidence.

Lot one, in section thirty-three, as sub-divided by the government, lies north of the river, and lot seven on the south side thereof. But, as we understand, (at least it will be so assumed,) Jacob Mustcher, at the time the deed from Buck to Crum was executed, owned five acres of land in lot seven, which abutted on the land claimed to be owned by the plaintiff on the south "end" thereof. The plaintiff further claims that there was a lot, known as lot one, which constituted a part of lot seven. But we do not understand that a plat of any subdivision of lot seven was ever filed and recorded as provided by law. Jacob Mustcher did not own any land in lot one, as recognized and described by the government survey; and it will be observed that the land conveyed by Buck to Crum is described as "joining on the south end on five acres of land belonging to Jacob Mustcher," and this call in the deed to some extent identifies the land claimed by the plaintiff; but the other call, on the face of the deed, describes other and different land. It is not claimed that the deed is void on the ground of the inconsistent calls or descriptions of the premises conveyed, but merely that the deed fails to describe the land upon which it is alleged the trespass was committed.

We think the deed was admissible in evidence, because it constitutes a necessary link in the chain of the plaintiff's title; and, while the description of the premises is undoubtedly defective, yet we think it not improbable that the plaintiff, by competent and satisfactory evidence, may be able to show that the land described in the deed is the same identical land as that upon which it is alleged the trespass was committed. Whether this was done on the trial below, we do not determine.

II. The plaintiff further objected to the admission of the deed in evidence, on the ground that the plaintiff had failed to show title in Buck, under whom the plaintiff claims. The order in which evidence should be introduced is largely in the discretion of the court below, and therefore it could not ordinarily be said to constitute error, if material and necessary evidence is introduced at any time during the trial. But we have looked through the record, and we fail to find that the plaintiff introduced, at any time during the trial, any evidence tending to show title in Buck; and yet he recovered. It must be assumed, therefore, that such evidence was not regarded as being essential.

The plaintiff did not allege in his petition that he was in possession of the premises, but solely relied on the alleged fact that he was the owner of the land in controversy. To constitute him such owner, he must show that he or his grantors obtained title from the general government. This the plaintiff failed to do, and, therefore, he was not entitled to recover, unless he was not required to trace his title back to the general government, because the defendant pleaded in his answer that Crum, at one time, owned the premises, and the plaintiff now owns whatever title Crum had.

But the defendant had the right to plead inconsistent defenses in the same pleading. Code, § 2710. Admissions

2. PRACTICE:
order of testi-
mony: discre-
tion of court:
example.

3. TRESPASS
on land:
proof of title
necessary to
recovery.

4. PLEADING : in one defense are not to be construed as affecting inconsistent defenses: a different and inconsistent defense. *Barr v. Hack*, 46 Iowa, 308. The defendant was entitled to the full benefit of each defense. The plaintiff, therefore, having failed to show title in himself, was not entitled to recover.

It will be assumed, however, that he can, on another trial, show that Buck had title, and therefore it becomes necessary to determine other questions presented in the arguments of counsel.

III. The plaintiff offered in evidence the plat-book kept by the county auditor, contemplated in Code, § 1950.

5. TITLE TO real estate : evidence: defective description : auditor's plat-book to aid. Against the objection of the defendant, the court permitted the evidence to be introduced. The plat-book showed that there was a lot one, which constituted a part of lot seven, and that the land claimed by the plaintiff was described on the plat-book as lot one. The book was admitted, as shown by the transcript, for the "purpose of proving that the sub-division was well known, and to identify the description as made therein." The effect of the evidence was in aid of the defective description of the premises in the plaintiff's paper title. It tended to show that there was a lot one in lot seven, and the question is whether the plat-book was admissible for this purpose.

It is provided by statute that "historical works, books of science or art, published maps or charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest." Code, § 3653. It is insisted that the evidence was admissible under this statute; but we think otherwise. The books and maps referred to in the statute are such as are published for circulation among the people generally. The book, map or chart must be published, in the broad sense of that term; that is, printed, or otherwise published, so that the presumption will follow that its contents are, or may be, generally known. Compiling and filing a record in a public office or place is not such a publication as is required by the statute.

It is further insisted that the plat-book is a public record, and therefore admissible under the rule stated in 1 Greenleaf Ev., §§ 483, 484. What is now section 1950 of the Code became a law in 1866, and constituted a part of chapter 61 of the Acts of the Eleventh General Assembly, entitled "An act for the transfer of real estate, to regulate the assessment thereof, and facilitate the collection of revenue." The only object of the statute, as will appear by an examination of the chapter, was to facilitate the assessment of property and the collection of taxes. For the purpose of compiling the book, the statute assumed that whoever paid taxes on real estate for the prior year was the owner; and when conveyances were thereafter made, changes were made on the plat-book by the erasure of a name, and writing the name of the grantee with a pencil across the piece of land, as designated on the plat-book, which, in the opinion of the auditor, had been conveyed. Such a book should not have any effect on private rights, unless specially so declared by statute, for the reason that it does not constitute the best evidence obtainable. The book, at most, is but a copy of the deed, and, if the deed is in existence, it clearly constitutes the best evidence as to what land is thereby conveyed.

It is further insisted that the plat-book was admissible as evidence, under Code, section 3702, which provides that duly certified copies of all "records and entries, or papers belonging to any public office," shall be "evidence in all cases, of equal credibility with the original record, or papers so filed." Conveyances of real estate are not filed and kept in the office of the county auditor, nor are they recorded in his office. They are, however, recorded in the office of the recorder, and such officer only is authorized to certify to a copy of a record in his office. Besides this, the plat-book is not a copy even of so much of a deed as contains a description of the premises, but the most that can be said is, that it states what premises, in the opinion of the auditor, were conveyed. It is not, therefore, a copy, but an original document compiled by such offi-

cer. We think the court erred in the admission, as evidence, of the plat-book.

IV. There was evidence tending to show that Crum, under whom the plaintiff claims, in 1860 owned the land claimed by the plaintiff, and that a survey was then made, and the boundary line between the premises of Crum and the defendant thereby ascertained, and that such line was agreed upon as the true boundary line between their respective tracts of land; and there was evidence tending to show that the defendant then entered into possession of the disputed parcel of land in accordance with the agreement. The court instructed the jury that such agreement would bind Crum and his privies, but would not be binding on the plaintiff, unless the jury found that the defendant held actual, open and notorious possession for a period of ten years next preceding the plaintiff's purchase.

Where a division line is agreed upon by persons owning adjoining real estate, and possession is taken in accordance with such agreement, we think such possession must be regarded as adverse from the time possession is taken; and, if so held and continued for the period of ten years next succeeding, it will ripen into a perfect title, binding upon the parties and those claiming under them. In *Bader v. Zeise*, 44 Wis., 96, it is said: "The proposition would seem to be incontestible that, if two coterminous proprietors agree upon and establish a dividing line between their premises, and actually occupy the land on each side of that line for twenty years, (in this state the period is ten years,) such possession will be adverse, and confer a title by prescription."

In the case at bar, it is certain that Crum could not, after the expiration of such period, have maintained an action to recover the land so occupied. *Hiatt v. Kirkpatrick*, 48 Iowa, 78. The defendant having obtained title by adverse possession, such title must be presumed to continue until it is divested in some manner recognized by law. Such a title

may be sold and conveyed, and Crum could do nothing which could in any manner impair it.

Having title, the defendant must be deemed to be in possession, and his actual occupancy is not essential to the continuance of such title. If it is, then such possession must be open and notorious for all time. It seems to us that it cannot make any difference how the title is acquired, if the right has become vested. Such a title, however, may become vested in another by adverse possession. That portion of the charge of the court under consideration is, therefore, erroneous.

There are other errors assigned and argued by counsel, which have not been considered, because they are not deemed essential to a proper determination of this case on a retrial.

REVERSED.

85 32
1109 296

DEERE & Co. v. WOLFF, DEFENDANT, AND THE SHENANDOAH NATIONAL BANK, INTERVENOR.

- 1. Contract of Sale: ILLEGAL CONSIDERATION: COMPOUNDING FELONY:**
WHAT IS NOT: RETURNING FORGED NOTES UPON PAYMENT. The holder in good faith of a forged note, received from the forger as collateral security, may lawfully deliver it to the forger, upon payment being made by him; and, although such delivery necessarily puts it in the power of the forger to destroy or suppress the paper, and, to that extent, to hinder and prevent his prosecution, and although such necessary consequence must be presumed to be intended by the holder of the paper when he so delivers it, yet such delivery is not the compounding of a felony, within the meaning of §§ 3951, 3952 of the Code. And in this case, where the alleged forger paid the notes by the sale and transfer to the holder thereof of certain personal property, *held* that such sale could not be set aside by an attaching creditor of the alleged forger, on the ground that the consideration thereof was illegal, and that the transaction was, therefore, void, and vested in the transferee no title to the property; and instructions given to the jury in this case, (see opinion,) not in accord with these views, were erroneous.
- 2. Compounding felony: EVIDENCE: FELONY MUST BE ESTABLISHED.** One cannot be directly or collaterally adjudged guilty of compounding a felony, unless it has been established that the other party to the unlawful compact is guilty of the felony. It is not sufficient that he be

Deere & Co. v. Wolff et al.

charged or indicted merely. So *held* in this case, where it was sought to annul a sale on the ground that the consideration thereof was the compounding of a felony, and, therefore, unlawful.

Appeal from Page Circuit Court.

FRIDAY, OCTOBER 24.

ACTION at law, wherein certain personal property was seized upon an attachment issued against defendant, Wolff. The Shenandoah National Bank intervenes in the action, claiming ownership of the property. A trial of the issues between plaintiffs and the intervenor resulted in a verdict and judgment for plaintiffs. The intervenor appeals.

Stockton & Keenan, T. E. Clark and W. S. Strawn, for appellants.

James McCabe, for appellees.

BECK, J.—I. The personalty in question was seized upon a writ of attachment issued against Wolff. The intervenor claims it under purchase from Wolff, made before the commencement of the suit and issuing of the attachment. In answer to the intervenor's petition, plaintiffs allege that "all claim or title of intervenor on said property is derived from defendant, H. S. Wolff, but that Wolff never assented to part with any title or interest in said property to intervenor, and that all power of assent by said Wolff given was obtained by intervenor by duress. * * * All claim of title or interest that intervenor has to or in the property in controversy was and is founded upon an illegal consideration, in that the same was secured by intervenor through a contract tainted with an agreement to stifle and hinder criminal prosecution for the crime of forgery against H. S. Wolff, from whom all of intervenor's claim is derived." It will be observed that the issues involve the legality of the

I. CONTRACT of sale : illegal consideration : compounding felony : what is not : returning forged notes upon payment.

contract of purchase of the property, which plaintiffs insist is void.

There was evidence tending to prove that intervenor held certain promissory notes executed by Wolff for money loaned by it; that Wolff transferred to the bank, as collateral security, certain other notes, the signatures to which, or indorsements thereon, were forgeries; that the officers of the bank and its attorney, becoming informed of the character of this paper, secured from Wolff, to secure his indebtedness to the bank, a mortgage upon real estate, and a chattel mortgage upon certain personal property to secure certain claims it held against him for collection. Subsequently Wolff transferred and delivered the personal property to the bank in satisfaction of claims held by it. There was evidence in regard to the value of the property and other matters, which need not be here referred to. No direct evidence was introduced showing that the mortgage and transfer of the personal property was extorted from Wolff through fear, on his part, of prosecutions for forgery to be instituted by the bank. Nor was there any such evidence of an agreement by the bank, in consideration thereof, not to prosecute him, nor to give evidence against him, to conceal evidence of forgery, or to "stifle and hinder" prosecutions therefor. It is claimed that the facts above stated and referred to are circumstances from which such illegal agreement may be inferred.

II. The circuit court gave to the jury the following
THE SAME. instructions:

"10. If the jury find from a preponderance of the evidence that the intervenor herein, at the time of the alleged purchase of the property in controversy, held promissory notes purporting to have been executed by third parties, which they had received either as collateral or by purchase from H. S. Wolff, and if you further find that such notes or any part of them were in fact forged, and the said Wolff had in fact forged the same, or was charged with the forgery thereof, and that said intervenor, by its president or cashier,

or either one of them, had knowledge of such forgeries, and that said H. S. Wolff was either guilty thereof or charged with the same; and if you further find that the intervenor, through its officers or attorney, acting for intervenor at the time, agreed to surrender, and did surrender, the said forged notes to the said H. S. Wolff in consideration of the sale and delivery of the property in controversy by said Wolff to intervenor, with the intent or purpose on the part of such officers, or officer, or attorney, acting at the time for intervenor, to place the evidence of such crime of forgery in the possession of said Wolff, to enable him to destroy or suppress the same, then such sale would be wholly void, and you should find for plaintiff.

"11. The mere taking of security or receiving payment for a debt evidenced by a forged note, or secured by forged collaterals, would not in itself be unlawful, or render such transaction void.

"12. The act of taking security or receiving payment of the debt must be coupled with some act done which would have in its tendency the effect of preventing and hindering the prosecution of such crime, and done with the intent or purpose of hindering or preventing such prosecution.

"13. And, before you can find for plaintiff upon such issue, you must find the purchase of the property in controversy was coupled with the surrender of forged notes, with the intent or purpose upon the part of the officers or officer of intervenor, or its attorney, acting for it at the time, to hinder or prevent the prosecution of said Wolff for the alleged crime of forgery; and such surrender with such intent or purpose should be established by a clear and fair preponderance of the evidence. It need not necessarily be established by direct proof; if it is established by the proof of such facts and circumstances as, taken together, would establish this, it would be sufficient. Proof that would create a bare suspicion of such intent would not be sufficient."

The jury were directed by these instructions that their verdict should be for plaintiff, if they found the forged notes were surrendered in consideration of the transfer of the property, with the intent on the part of defendant's officers "to place the evidence of such crime of forgery in the possession of said Wolff, to enable him to destroy or suppress the same," or if they found the purchase of the property was "coupled with" the surrender of forged notes, with the intent on the part of the officers of the bank "to hinder and prevent" the prosecution of Wolff for forgery, or if they found the surrender of the notes was coupled with some act which would have a tendency to that effect. The doctrines of the instructions, stated generally, are these:

If one holding a forged promissory note, given him as collateral security by the guilty party, who is authorized to pay it, receives payment thereof from such party by the transfer of property, and surrenders to him the note, with the intent to place the evidence of the crime in the hands of the guilty party, that he may destroy or suppress it, or, if the payment of the note was united with its surrender, or with some other act tending to hinder or prevent a prosecution for forgery, with the intent to hinder or prevent such prosecution, the contract of transfer is void.

It must be here observed that the evidence referred to in the instructions, together with the foregoing statement of their doctrines, must be regarded as referring to the forged notes, as there is not a particle of evidence tending to show that any other instrument of proof was placed in Wolff's hands. If it is not so understood, the instructions are plainly erroneous, for the reason that there is no evidence tending to prove facts to which they are applicable. We will, therefore, discuss the instruction, in the view that they are restricted to the surrender of the alleged forged notes.

We will proceed to inquire into the correctness of the rules of the instructions.

III. It is a familiar rule of the law that illegal contracts

—such as are based upon unlawful considerations, or are made in contravention of the law, or of public policy, or for purposes criminal or immoral in their nature, are void. We are to inquire whether the acts contemplated by the instructions bring the contract under which the property in question was transferred within this rule. These acts are,—(1) the surrender of the forged notes upon payment thereof, with the intent of placing them in the possession of the guilty party, so that he could destroy them; (2) the receipt of payment of the notes, and, thereupon, their surrender, with the intent of preventing and hindering, or that the act should tend to prevent or hinder, the prosecution of Wolff for the crime of forgery.

We will consider these acts separately, in order to determine whether they are illegal.

1. Surely a party holding in good faith forged paper, (and it is not claimed that the bank did not so hold the paper in question,) may accept payment in money, or receive payment in property, from the guilty party, who is bound upon the paper for the payment thereof. It cannot be that the holder must lose his debt, for the reason that the law forbids him to receive payment. This proposition will not admit of argument. Upon receiving payment of paper, the law requires the holder to deliver it to the person paying it. Now, if he may accept payment from the forger, he may surrender the paper to that person. The surrender of the paper would, in the language of the instruction, “enable” the forger “to destroy or suppress” the paper. The holder may intend to place the paper in the hands of the forger, and thus *intend* “to enable him to destroy or suppress it,” without an unlawful purpose. The delivery of the paper is lawful; but it gives the forger an opportunity to destroy it, and he is *enabled*, by the delivery, to do so. The holder, therefore, could not deliver the paper without the purpose of enabling, thereby, the guilty party to destroy or suppress it. But, as we have seen, the delivery of the paper was a lawful

act. The instructions do not contemplate that it was done with the intent to procure, induce or cause the destruction of the paper, which doubtless would be unlawful. It is a very different thing to induce or cause an act, and to give an opportunity to do it. One may innocently and lawfully do an act, when inducing or causing it would be unlawful. The instructions erroneously express the thought that the destruction or suppression of the notes would amount to a destruction or suppression of the evidence of the forgery. It is true that it would amount to the destruction or suppression of an instrument which, if in existence and not in the hands of the accused, must be produced at the trial upon an indictment for the offense. But, if destroyed or withheld by the accused, secondary evidence of its contents may be introduced. 3 Greenleaf's Ev., § 107. This authority presents the suggestion that the suppression of the paper may increase the difficulty of proving the crime. This difficulty extends no further than to require secondary evidence of the contents of the paper, and to render it impossible to introduce proof by the comparison of the signature to the instrument with genuine signatures. But always, when the accused claims that the signature is genuine, the paper is wanted by him for the purpose of comparing the hand-writing with the true signature of the accused. We discover nothing in the first class of acts, which are now under consideration, to authorize the conclusion that the bank did anything in contravention of the law, or of public policy, or for purposes criminal or immoral in their nature.

2. The same course of reasoning leads to the same conclusion as to the acts contemplated in the second class above designated. If the bank was lawfully authorized to deliver the forged paper upon its payment by Wolff, and such delivery hindered, or tended to hinder, a prosecution, this was the necessary result of the delivery, and, if intended, such intent was not in violation of law, public policy or good morals, as it was entertained in the exercise of the lawful right of the

bank; for the delivery of the paper, which is inseparable from the intent, was done in obedience to the requirement of the law imposing the duty upon the holder of paper to surrender it upon payment, when required to do so.

IV. The acts of the bank contemplated by the instructions are not offenses under the statute of this state. They do not constitute the compounding of a felony, which
THE SAME. occurs when "any person, having knowledge of the commission of, an offense punishable by imprisonment in the penitentiary" * * * takes any money, or valuable consideration, or gratuity, or any promise therefor, upon an agreement or understanding, express or implied, to compound or conceal such offense, or not to prosecute the same, or not to give evidence thereof." Code, §§ 3951, 3952. The delivery of a forged promissory note to the forger upon payment by him, which he was authorized to make, "with the intent to enable him to destroy and suppress it," and with the intent to "hinder and prevent" the prosecution of the forger, does not constitute an offense under the provisions of the statute above cited. These acts, and none others, are contemplated in the instructions to the jury given in this case. They cannot be the foundation of a claim that the contract for the purchase of the property was void for the reason that the officers of the bank, under the sections of the Code above cited, were guilty of compounding a felony in the purchase of the property under the circumstance and upon the agreement contemplated in the instructions.

V. The tenth instruction directs the jury that the rules therein expressed are to be applied, in case they find that Wolff was charged with the crime of forgery.
2. COMPOUND-
ING felony;
evidence: fel-
ony must be
established. This is obviously incorrect. Before the bank or its officers can be found guilty of any wrong or crime in connection with the transaction, it must be established that Wolff was guilty of forgery. A mere charge of guilt, or an indictment for the crime, would not authorize the conclusion that there had been any compounding of a felony,

or any act done by the bank or its officers contrary to law or public policy, or against good morals. It is proper to remark that this objection is not urged in argument by the intervenor's counsel.

The instructions, so far as they are not in accord with these views, are erroneous. Other objections presented by counsel need not be considered, for the reason that the points we determine are decisive of the case, and will probably dispose of it finally upon another trial.

REVERSED.

BAIRD ET AL V. BROOKS ET AL.

1. **Estates of Decedents: TITLE TO PROPERTY.** No action can be maintained by the heirs of a decedent upon a promissory note, the property of the decedent at the time of his death, when the time for granting letters of administration has not expired. Such note belongs to the estate and not to the heirs. *Haynes v. Harris*, 33 Iowa, 516, followed; *Phinny v. Warren*, 52 Id., 332, distinguished.

Appeal from Carroll Circuit Court.

FRIDAY, OCTOBER 24.

THIS action was commenced before a justice of the peace upon a promissory note. The defendant, Brooks, was not served with notice of the action. Defendant, Hoyt, appeared and answered, and judgment was rendered against him. He appealed to the circuit court. The cause was submitted in that court upon an agreed statement of facts, and judgment was rendered for the plaintiff. Defendant, Hoyt, appeals.

Geo. W. Paine, for appellants.

J. E. Griffith, for appellees.

ROTHROCK, CH. J.—The agreed statement of facts is as follows:

65	40
d108	699
65	40
e130	135
65	40
144	530

1. The defendants made and delivered to W. V. Baird the note sued on in this action, and defendant, Hoyt, was surety thereon.

2. The said W. V. Baird, after giving said note, and before the commencement of this action, died, intestate, leaving the plaintiffs his heirs at law; and no administration has been granted on the estate of said W. V. Baird.

3. That the said Baird was the owner of the said note at his decease, and the only title the plaintiffs have to said note is the right they have as heirs at law of said W. V. Baird.

4. Said L. H. Brooks has not been served with original notice in this action.

That plaintiffs, the heirs at law of W. V. Baird, are all of lawful age.

That before the commencement of this suit defendant, Brooks, removed to Webster county, Iowa, and, though notice of the pendency of this suit was sent to the sheriff of said Webster county, defendant, Brooks, was not found.

The question presented by counsel for appellant is whether the plaintiffs can maintain the action. It is claimed by counsel that the heirs of W. V. Baird have no authority or control over the personal assets of the estate, and cannot collect the debts due, because such authority and control is vested in the administrator of the estate. It is claimed for appellee that the defendant should have demurred, and that he cannot raise a question as to defect of parties in this court. It appears, however, that Hoyt appeared and answered. What his answer was is not shown. We will presume that the agreed facts were pertinent to the issue. Besides, we think that the objection was properly presented in the statement of facts, and, under section 3413, of the Code, a submission of a case upon an agreed statement of facts "shall be an abandonment by both parties of all pleadings filed in such cases."

The question here presented is not an open one in this state. In *Haynes v. Harris*, 33 Iowa, 516, it was expressly

held that no action could be maintained by the heirs of a decedent upon a promissory note, the property of the decedent at the time of his death. That is the precise question in this case. In that case, as in this, the period fixed for granting letters of administration had not expired. In *Phinny v. Warren*, 52 Iowa, 332, the time for granting letters of administration had expired, and it was held that the heirs could maintain the action. Following the case of *Haynes v. Harris*, the judgment of the circuit court must be

REVERSED.

SUTLIFF ET AL. V. BROWN.

1. Practice in Supreme Court: WAIVER OF GROUND OF DEFENSE.

Where a point is raised by the answer as a ground of defense, and it may have been the ground on which the trial court based its judgment for defendant, the point will not be disregarded in this court, unless expressly waived.

2. Judgment: CONCLUSIVENESS OF AS AGAINST COLLATERAL AGREEMENT. A judgment is designed as a finality; and courts are not open for the rendition of apparent judgments, but which are not judgments in fact, because the parties have agreed in advance that they should not be conclusive. Accordingly, in this case, where a surety brought an action against his principal and his co-sureties to recover amounts paid by him in the settlement of claims against his principal, and obtained judgment by default for different amounts against the several defendants, *held* that the co-sureties could not, in a subsequent action, have the judgments canceled, on the ground that, by an understanding between all the parties, the judgment plaintiff was a trustee for all the other parties, and was entrusted by them to take judgment only for the proper (but undetermined) amounts, but that he had in fact taken judgment for amounts greater than were equitable.

3. Trust: ACCOUNTING FOR PROFITS: WHOLE TRANSACTION TO BE CONSIDERED. An action cannot be maintained against a trustee for the profits of a transaction, or series of transactions, until it is closed up, so that it may appear what the profits are; and where, upon the whole transaction, or series of transactions, the profits which have come into the hands of the trustee do not exceed the losses, no recovery can be had. So *held* under the facts of this case, for which see opinion.

Sutliff et al. v. Brown.

4. **Judgment: CREDIT NOT INDORSED: EQUITABLE RELIEF: PRINCIPAL AND SURETY.** Where a surety has obtained judgment against his principal and co-surety for payments made, the co-surety can not have an accounting in equity with the judgment plaintiff, on the ground merely that the latter has received money which should be applied as a credit on the judgment, for it will be presumed that the judgment plaintiff will indorse the amount before issuing execution, or that, upon payment of the difference, he will cancel the judgment.

Appeal from Johnson District Court.

FRIDAY, OCTOBER 24.

ACTION in equity for an accounting, and for the cancellation of certain judgments. The court dismissed the plaintiffs' petition, and they appeal.

S. H. Fairall and *Milton Remley*, for appellants.

Boal & Jackson, for appellee.

ADAMS, J.—The different matters in controversy in this case have arisen by reason of the insolvency of one C. W. McCune. The plaintiffs, H. S. Sutliff and J. P. McCune, and the defendant, E. A. Brown, and also one Pratt, not a party hereto, were co-sureties for C. W. McCune. Brown purchased claims against C. W. McCune, and paid indebtedness against him, for which he and the plaintiff were liable as co-sureties, and afterwards obtained a judgment against C. W. McCune for the sum of \$27,690.83, and a decree of foreclosure of certain mortgages. These plaintiffs, Sutliff and J. P. McCune, were made parties defendant to the action, and judgment was rendered against each for part of the amount for which judgment was rendered against C. W. McCune, to-wit, judgment for \$868.93 against Sutliff, and \$2,000 against J. P. McCune. The plaintiffs claim that there is nothing due upon these judgments, and that they ought to be canceled. There were several transactions out of which the matters in controversy in this case have arisen, and some of them are complicated. A more detailed state-

ment of the facts will be made as it shall become necessary in the determination of the different questions.

I. The plaintiffs claim to be aggrieved by the rendition of the judgment against C. W. McCune, in that it was rendered against him for too large an amount, and the consequence was that property was exhausted upon which they, as sureties for C. W. McCune, had a right to rely for their protection. They also claim to be aggrieved by the rendition of the judgments against them respectively, as above set out, in that they were rendered for too large an amount.

The defendant, while denying that the judgments were rendered for too large an amount, avers that the plaintiffs are concluded by the judgments.

The first question which the plaintiffs present in their argument is as to the conclusiveness of these judgments.

Before proceeding to its determination, we ought, perhaps, to say that the defendant does not, in his argument, seem to especially insist upon their conclusiveness. His counsel say for him that he wishes the case tested by the rules of conscience, and they make an elaborate argument for the purpose of showing that the amount for which the judgments were rendered is correct.

The fact, however, that the plaintiffs present the question as to the conclusiveness of the judgments, as lying upon the threshold, leads us to suppose that the question was regarded as in the case upon the trial below. It follows that the court below may have held them to be conclusive, and, as the question is not now expressly waived, we think that we must still regard it as in the case.

The alleged ground upon which the plaintiffs claim the right to question the correctness of the judgments, in respect to their amount, is that the defendant, Brown, in obtaining the judgments, was acting as their trustee. The evidence shows that C. W. McCune, out of whose insolvency these troubles have arisen, was a large farmer in Johnson county. His

1. PRACTICE
in supreme
court: waiver
of ground of
defense.

2. JUDGMENT:
conclusive-
ness of as
against collat-
eral agree-
ment.

farm and personal property thereon were supposed to be worth from \$40,000 to \$50,000. He was the owner of several thousand dollars' worth of graded stock, which he had bought at large prices; but in so doing he had become largely indebted, and had been obliged to raise money by borrowing. He had mortgaged his property, but his resources for obtaining money by mortgaging were insufficient. He accordingly induced his brother, the plaintiff, J. P. McCune, and his brother-in-law, the plaintiff, Sutliff, to become sureties; and, in addition, he induced his neighbor, the defendant, Brown, and his neighbor, Pratt, not a party hereto, to become sureties for him.

The plaintiffs, and Brown and Pratt also, borrowed for him \$7,500 of the Johnson County Savings Bank, and, to protect themselves, they took his note, secured by mortgage upon his property, real and personal, which mortgage, however, was subsequent to other mortgages. This debt to the Johnson County Savings Bank C. W. McCune succeeded in reducing. Brown purchased the prior mortgages, except one, and acquired or discharged some claims upon which the plaintiffs were sureties. He also acquired the mortgage above mentioned, given to secure the plaintiffs and Brown and Pratt for their liability to the Johnson County Savings Bank. Having acquired these claims, he proceeded to foreclose, making parties to his action not only C. W. McCune, but these plaintiffs, Sutliff and J. P. McCune. The latter were made parties, not only on account of their alleged liability to Brown, but because they were interested in a mortgage which was subsequent to other mortgages held by Brown, and embraced in the foreclosure action.

It was important to these plaintiffs, as well as to Brown, that the different mortgages should be foreclosed, and the proceeds applied, as far as they would go, in the payment of the indebtedness. They did not, therefore, object to the foreclosure, but entered into a written agreement with Brown in respect to the application of the proceeds of sale. It is

unnecessary to set out the whole agreement. It contained a provision in these words: "And it is understood and agreed that any sum so applied upon said note of \$7,500 shall be in his (said Brown's) hands a trust fund; first, to repay said Brown and the undersigned any amounts they have paid, or may pay, upon their joint notes heretofore given to the Johnson County Savings Bank, * * * and, secondly, to apply any further balance to the extinguishment and payment of said notes, such payment to be so made as to make the amount so paid upon said notes by each of said makers equal, the liability of each of said four parties being equal." The foregoing, and some other things of a similar character, are relied upon as showing that Brown became the plaintiffs' trustee, and became charged with the duty of determining in their behalf the amount for which judgment should be taken against them, and also the amount of the prior liens which stood in their way, and which were held by him.

But we are unable to discover that Brown was made a trustee for any purpose except a proper application of the proceeds of sale. It would be a strange transaction for a debtor to make his creditor his trustee to obtain a judgment against him for an amount not agreed upon, and uncertain, and the correctness of which should be reviewable at any time. A judgment is designed as a finality. Courts are not open for the rendition of apparent judgments, but which are not judgments in fact, because the parties have agreed in advance that they should not have the characteristics of a judgment. These plaintiffs were called upon to adjust their liability and the amount of the prior liens in the foreclosure action. That was the very object of the action. There was no reason for postponing such adjustment to a later day. It appears to us to be a case of ordinary default, allowed by reason of sheer negligence, or negligence combined with confidence that the creditor knew what was due him, and would take judgment for only that amount. Courts of

equity are not organized for the protection of those who will make no effort to protect themselves when they have an opportunity to do so.

In view of the elaborate arguments made on both sides in respect to the correctness of these judgments, we may say that we have examined the evidence of their correctness, and are inclined to think that the ruling below could be sustained upon such evidence; but, holding, as we do, that the judgments are conclusive, it is not necessary or proper that we should go into a discussion of the evidence.

II. The mortgaged property was sold by Brown upon execution under his foreclosure, and was bid in by him for \$22,800. From one of the tracts bid in he afterward sold timber, and after that he sold a portion of the land, and realized more than he bid on that tract, with interest. The plaintiffs claim that he should account for the profits, and allow the same to be applied toward the satisfaction of the balance of the judgment remaining after the execution sale. Their claim is based upon an alleged agreement that Brown should purchase at execution sale, and hold the land for future private sale for the benefit of himself and the plaintiffs.

According to the plaintiffs' evidence, the agreement was that Brown should bid in the different tracts at certain agreed prices, if they did not sell for more to third persons; that Brown should proceed to dispose of the land at private sales for the benefit of himself and plaintiffs, and that they should share with him in the profits, if there were profits, and contribute to reimburse him for losses, if there were losses. Taking this to be the agreement, the question arises as to whether the plaintiffs are at present entitled to an accounting for profits. A portion of the land remains unsold, and it is impossible to say whether there may not be a loss sufficient to offset any profits thus far made. In our opinion, the time for an accounting of profits and losses has not yet come.

To entitle the plaintiffs to an accounting, they should, we

3. TRUST: accounting for profits: whole transaction to be considered.

think, have offered to take the unsold land off the defendant's hands at some specific price, and if he refused to take such price he might probably be charged with the amount offered, and a basis thus be laid for an accounting.

III. The evidence shows that one Austin McCune, son of C. W. McCune, entered into a cattle transaction with Brown;

that in doing so he was assisted by his father,
THE SAME. and it was agreed that the profits made by Austin should be paid by him to Brown, and applied on the father's indebtedness to Brown. The transaction was, in substance, as follows: Brown furnished money to purchase cattle, which were cared for and fed for a time by Austin McCune on his father's land, and afterward marketed. Brown was to be reimbursed for simply the money advanced and interest. The plaintiffs claim that profits were made, and that the same ought to be applied upon the indebtedness in question.

The fact appears to be that the transaction, as a whole, did not result in profits; that only the earlier sales did, and the defendant contends that, under such a state of facts, there was nothing to apply.

The parties agree substantially as to the amounts and dates of advances made by Brown, and as to the amounts and dates of receipts. They show that at one time Brown had received \$385.30 more than he had advanced, but immediately afterward he advanced \$440 more, and afterwards the business was such as to result in Brown's obtaining only \$54.25 more than his advances, which, as we understand, was less than his claim for interest. The question presented is as to whether, under the contract, the court should separate the sales, and apply on C. W. McCune's indebtedness such profits as were made on the profitable sales, regardless of losses incurred on the unprofitable sales. The language of the contract is as follows: "The proceeds of said sale, or sales, are to be applied by said Brown, *First*, to the repayment of cost and ten per cent interest from the date of the money so fur-

nished; *Second*, the margin of profits remaining is to be applied towards the payment of," etc. In our opinion, by "margin of profits remaining" was meant the profit as it should appear as a whole at the close of the cattle transaction.

The plaintiffs insist, however, that there were two cattle transactions, the first under the contract above referred to, commencing January 31, 1880, and terminating March 23, 1881, and that, under such transaction, there was a margin of profits above losses.

The fact appears to be that, at the date last above mentioned, a second contract was entered into, by which the rate of interest on advances was reduced to eight per cent. This contract also provided for the application of profits as often as sales should be made.

But the second was made before the business under the first was wound up, and seems to amount to nothing more than a mere change of the terms upon which their cattle business should be conducted.

The plaintiffs claim that the profits at one time had amounted to \$1,397; that this money was, under the second contract, used in the business, which was a virtual appropriation thereof by Brown, and that he should, therefore, be regarded as having received it, and, if so, that it should be regarded as applicable upon the indebtedness of C. W. McCune.

The theory that the profits were virtually appropriated by Brown seems to rest upon the alleged fact that the money realized as profits was used in the cattle business. But we are unable to discover that Brown had any benefit from such use, or expected to have. The books do not show that he received credit for any money except what he actually advanced. The fact doubtless is that profits were made which were never paid to Brown, and it seems not improbable that the money realized as such profits was used by Austin McCune. But we see nothing in this fact alone

which should render Brown chargeable. He was not chargeable with profits which he neither received nor obtained a credit for.

It is true, as we have shown; he did, at one time, have in his hands \$385.30 more than he had advanced, but, the business being still in progress, and such as to require an almost immediate advancement of \$440, which was made, we do not think Brown should be charged with the \$385.30. Neither that sum nor any other was a "margin of profits remaining," taking the word "remaining," as we do, as referring to the time of the close of the cattle transaction. As to profits made after the date of the second contract, no question arises, because there does not appear to have been any.

IV. The plaintiffs claim in argument that the defendant, after the rendition of the judgment in his favor, received \$247.20 as money collected on a note belonging to C. W. McCune, and which amount should be endorsed upon the judgment. The theory is that this was a payment of so much by C. W. McCune. If it was such, it would operate, of course, as a satisfaction of so much of the judgment. But we do not think that such mere fact of payment would entitle the plaintiffs to equitable relief. If Brown received such payment, it is to be presumed that before the issuance of an execution against the plaintiffs he will make the proper endorsement, or, if the plaintiffs should tender the balance due after such payment, that he would cancel the judgment.

We think that the decree of the district court must be

AFFIRMED.

4. JUDGMENT:
credit not in-
dorsed: equit-
able relief:
principal and
surety.

THE STATE V. FOLEY ET AL. (Five cases.)

65	51
94	62
65	51
143	563

1. **Criminal Procedure: CHANGE OF VENUE: PREJUDICE OF JUDGE: DISCRETION: APPEAL.** Although an application for a change of the place of trial of a criminal case, on the ground of the prejudice of the judge, makes allegations upon which, *if true*, a change should be granted, it does not follow, as a matter of course, that the change must be granted; for the judge may consult his own feelings as well as the papers, and grant or deny the change, as he may think the right demands, in the exercise of a careful discretion; and his ruling will not be reversed on appeal to this court, unless it is made to appear that prejudice in fact existed; and it does not so appear from the record in this case. (See opinion.)

Appeal from Marshall District Court.

FRIDAY, OCTOBER 24.

The defendants in the above entitled cases were each convicted of keeping a nuisance, in the use made by them of a building in keeping and selling intoxicating liquors, and were fined therefor. The defendants appeal.

No appearance for the appellants.

Smith McPherson, Attorney-general, for the State.

ADAMS, J.—The cases are submitted together as involving the same question of law. The defendants filed a petition for a change of the place of trial, on account of the prejudice of the judge. The petition not only states in a general way the existence of prejudice, but states specifically certain facts as evidence of prejudice. The facts stated are, that the judge had lately been engaged in making public speeches, and against saloon men; that petitioners had been informed that the judge had said at a public meeting that a saloon-keeper was worse than a thief and a robber, and that the judge was acquainted with the defendants at the time the statement was made, and knew them to be saloon-keepers; that he had

expressed his opinion and belief that the defendants were guilty of the offenses charged; that the judge recently, upon the trial of a similar case, had manifested a strong prejudice against the defendant in that case; that he told the witnesses upon the stand that they knew that they were not telling the truth, and that every one who heard them knew it.

We do not think that the fact that the judge made public speeches in favor of temperance should be regarded as showing a prejudice against these defendants. We have a right to assume that the defendants themselves are in favor of temperance, and opposed, not only to sales of intoxicating liquor made in violation of law, but to all other sales, so far as the same lead to intemperance. We have a right to assume that what the judge said against saloon men was said against those who he supposed had been making such sales.

If it was true, as is alleged, that the judge had expressed an opinion that the defendants had been guilty of the offenses with which they were charged, it appears to us that he should have granted the petition. Whatever offense a person may be charged with, it is his right to be tried before a judge who has not prejudged his case. But because the petition showed sufficient ground, if true, for a change of venue, it did not follow that it should be granted as a matter of course. Some latitude is left to the judge in passing upon the petition based upon allegations of his own prejudice. He may consult his own feelings as well as the papers, and grant or deny the change, as he may think the right demands, in the exercise of a careful discretion. Code, § 4374; *State v. Ingalls*, 17 Iowa, 10. If allegations of specific facts are made and supported by such evidence that the appellate court should be constrained to believe that, notwithstanding the change was denied, prejudice in fact existed, and that the change was denied through false pride, it would, of course, be the duty of the appellate court to promptly interfere. But the case before us is not one of that kind. No specific times or places are mentioned in which the judge expressed opinions

The State v. Karver.

adverse to the defendants, and the impression left upon our mind is that the petitioners were either unable or unwilling to mention them. We see nothing in the case that would justify us in holding that the court abused its discretion. We have examined the entire record, and find no error.

AFFIRMED.

THE STATE V. KARVER.

1. **Bastardy: UNCHASTE CONDUCT AND MOTIVE OF COMPLAINANT: EVIDENCE.** In a bastardy proceeding, especially where the complainant claims to have been ravished, where the only question is that of paternity, and the circumstances are such as not to preclude the possibility that one other than the defendant may be the father of the child, it is proper to show the unchaste conduct of the woman with such other person, and that, on account of such conduct, trouble arose between her and the family of defendant, thus showing a motive on her part for falsely charging the defendant; and the questions asked defendant as a witness in this case (see opinion) should, accordingly, have been allowed.

65	58
87	356
65	53
108	742

Appeal from Des Moines District Court.

FRIDAY, OCTOBER 24.

THE action was brought to charge the defendant with the support of a bastard child. There was a verdict of guilty, and judgment was rendered against him accordingly. He appeals.

Dodge & Dodge, for appellant.

Smith McPherson, Attorney-general, for the State.

ADAMS, J.—The defendant is charged with being the father of a bastard child, born to one Lizzie Mohler, sister to the defendant's wife, all residing in the city of Burlington. The complainant testified in these words: "My sister and I were not on good terms all the time. Seventh of July I went

over to his house—don't know what time. Mr. and Mrs. Karver were all that were there. Left there quarter after nine. We had not gone more than three blocks when this thing took place, in an open public place, ground kind of sidling, fronting one street. He asked me on that lot. It was the first time anything ever took place between us. I did not consent. I jerked away and walked off. He followed me and threw me right down. He ravished me. I hollered. There were no marks on my person. My hat was torn." She also testified that he had connection with her another time by force in nearly the same place.

The defendant testified, denying that he ever had connection with her.

For the purpose of impairing the credibility of her testimony, the defendant's counsel asked him, when a witness upon the stand, two questions, which are in these words: "Int. 28. You say that she came to your house in January, 1882. State how she came to leave. What was the trouble?" "Int. 29. You tell the court what imprudent act you noticed, or about a man being with her one night, at your house. Go on and tell it; in January, 1882?" Both these questions were disallowed as immaterial, and the ruling is assigned as error.

In our opinion the witness should have been allowed to answer them. That the complainant had an illegitimate child by some one is not denied. That she charged it upon the wrong person the jury did not believe. But she might do so if she was not a truthful person, and had a strong motive for doing it. The questions asked and disallowed indicated upon their face that the defendant expected to prove that the complainant was guilty of imprudent conduct with some man at the defendant's house, and that she had trouble, and left the family.

If the defendant and his wife witnessed unchaste conduct on the part of the complainant, and she had trouble with them, either on that account or any other, such fact, we think,

would tend to render the defendant's testimony more credible, and her testimony less so, by showing a motive on her part for charging upon him the paternity of a child which should have been charged upon another; and especially is this so, as the charge made is that she was ravished.

Again, in a case of this kind, where the only question is that of paternity, it should always be allowable to show unchaste conduct with a man, other than the defendant, and especially if the circumstances are such as not to preclude the possibility that the other was the father of the child.

It is objected by the attorney-general that the questions are not sufficiently explicit to indicate what the defendant expected to show. But we do not think that this objection occurred to anyone on the trial below. The questions were asked in examination in chief, and were about as explicit as they could well have been, without being leading. We think that the court fully understood the drift of the inquiry, but did not deem it a proper one. In our opinion, the court erred in disallowing the questions.

REVERSED.

BROWN V. RODOCKER ET AL.

1. **Mechanic's Lien: FOR WORK AND MATERIALS ONLY: RULE APPLIED.**

A mechanic's lien will attach, and can be enforced, for work and materials only. Accordingly, where plaintiff and defendant traded properties, and defendant's property was estimated to be worth \$250 more than plaintiff's, and plaintiff agreed to pay this difference in work and materials to be furnished for a house for defendant, but defendant's property was mortgaged for \$250, which she agreed to pay, and plaintiff performed his part of the contract by furnishing the labor and materials, but defendant failed to pay off the mortgage, held that defendant's indebtedness to plaintiff was not for the labor and materials furnished, and that a mechanic's lien would not attach therefor to the property for which they were furnished.

Appeal from Greene Circuit Court.

FRIDAY, OCTOBER 24.

ACTION to foreclose a mechanic's lien. After the plaintiff had introduced his evidence, the circuit court, without hearing evidence on the part of defendants, upon their motion, dismissed plaintiff's petition. He now appeals.

C. H. Jackson, for appellant.

McDuffie & Howard, for appellees.

BECK, J.—I. The facts disclosed by plaintiff's evidence are as follows: Plaintiff traded to defendant, Rodocker, eighty acres of land in Clay county for a house and lot in Scranton. There was an estimated difference in values of \$250 in favor of the Scranton property, which plaintiff undertook to pay by work and materials to be furnished for a house to be built in Churdan. The Scranton property was encumbered to the amount of \$250. The conveyances of the separate properties were made pursuant to this trade, and plaintiff furnished the material and performed the work stipulated for upon the Churdan house. Rodocker was to pay the encumbrance upon the Scranton property, but failed to do so.

II. This action is to enforce a mechanic's lien upon the Churdan house on account of the \$250 expended thereon by plaintiff. It is plain that defendants owe him nothing for materials and labor upon this house. He was paid therefor by the conveyance of the Scranton property. But it is claimed that, by reason of the failure of defendants to pay the mortgage thereon, they owe plaintiff \$250. That is quite true, but it is not a debt for work and materials; it is based upon the failure of defendant to pay the mortgage on the Scranton property, and upon such breach of contract there is no remedy by proceedings for a mechanic's lien. Such lien can be enforced only for work and materials; it surely does not exist on account of a failure to pay the encumbrance.

But plaintiff insists that it was agreed that, to secure him

Traver v. Shiner, Adm'r.

against the mortgage, he was to have a mechanic's lien upon the Scranton property. If it be conceded that it was competent for the parties to make a contract providing that a mechanic's lien should be enforced in case of failure to pay the mortgage, (a very doubtful proposition,) yet the evidence fails to establish that a contract of that kind was really entered into between the parties. Plaintiff testifies that he was to have a "lien" to secure him, and that he "took a lien" for that purpose. But he does not testify to any agreement of the parties authorizing him to take and enforce a mechanic's lien. Plaintiff offered to prove that Rodocker had, in some connection, said that plaintiff "had a lien" on the Churdan house. But the character of such lien, and whether defendants agreed to its enforcement, was not shown or attempted to be shown by the evidence offered, which was excluded. Had it been admitted, it would not have changed the result in the case. Therefore, considering this excluded evidence as competent and before us, with all the other proof, we reach the conclusion that plaintiff is not entitled to recover in this action. The judgment of the circuit court is

AFFIRMED.

TRAVER V. SHINER, ADM'R.

65 57
d130 254

1. **Domestic Relations: SUPPORT OF PARENT BY CHILD: COMPENSATION.** A son cannot recover of his father's estate compensation for the support of his father in his family, as a member thereof, in the absence of a contract for such compensation; and the evidence in this case (see opinion) does not support the theory that there was such a contract.

Appeal from Pottawattamie Circuit Court.

FRIDAY, OCTOBER 24.

THE plaintiff filed a claim against the estate of which

Traver v. Shiner, Adm'r.

defendant is administrator, for the support of the intestate, in his lifetime, for fourteen years, at \$100 a year. The cause was tried to a jury, and a verdict was had for plaintiff, upon which judgment was rendered. Defendant appeals.

Smith, Carson & Harl, for appellant.

Wright & Baldwin, for appellee.

BECK, J.—I. The evidence proves that the intestate lived with plaintiff, his son, for fourteen years, as a member of his family. This action is brought for the value of the support of intestate for this time.

The circuit court instructed the jury that, if they should find that the intestate, during the time plaintiff supported him, was living as a member of plaintiff's family, he cannot recover, unless they should further find from the evidence that it was understood and agreed between the father and son that the latter should receive compensation from the former for his support. Plaintiff does not deny that the intestate, during the time covered by his claim, was a member of his family, and the correctness of the rule of the instruction is not questioned. But he insists that an express contract may be inferred from declarations and other circumstances, and that the evidence in this case authorized the conclusion reached by the jury, that there was an understanding between the parties that plaintiff was to receive compensation from the intestate.

II. We fail to discover any evidence upon which a contract may be inferred. About all the evidence upon this point, which is relied upon by plaintiff, consists of declarations to third parties, in which the intestate stated that he was receiving support from plaintiff, and that he intended "some day or other to make it right," and that "he had some land, and, when he disposed of it, he intended to pay his way to George (plaintiff) and his wife." There is not one word tending to authorize the conclusion that there was any expectation on

the part of plaintiff to claim or receive compensation from his father.

Counsel for plaintiff cite and rely upon *Van Sandt v. Cramer*, 60 Iowa, 424, in support of their position that the evidence in this case authorized the jury to find that the support was received by the intestate under an agreement to pay for it. We think the case does not sustain plaintiff. The evidence in that case is not stated in the opinion. But it is said that "no other conclusion can be reached than that the intestate bound herself, before the services were rendered, to pay for them, and that she was not merely a member of plaintiff's family." In this case, the meager evidence above stated does not tend to raise an inference of a contract. Whatever the intestate said in regard to paying plaintiff was simply the expression of an intention to return kindness extended to him by his son and daughter-in-law, by payment of money to them when he should sell his land, or obtain money in some other way. It does not appear that he expressed the thought that he was under obligation to pay the son, or that he supposed the son expected payment.

We reach the conclusion that there is an utter failure of evidence to support the conclusion reached by the jury, that there was a contract between the father and son for payment on account of the father's support.

REVERSED.

GRIFFIN V. PAINTER, SHERIFF.

1. THE case of *Albertson v. Kriechbaum*, ante, p. 11, followed.

Appeal from the order of Hon. Josiah Given, Judge of Circuit Court of Polk County.

FRIDAY, OCTOBER 24.

W. S. Sickmon, Lehman & Park, and M. W. Folsom,
for appellant.

Baylies & Baylies and Smith McPherson, Attorney-general, for appellee.

REED, J.—This case presents the same questions that are considered in the second division of the opinion in the case of *Albertson v. Kriechbaum*, ante, p. 11, and, following that case, it is

AFFIRMED.

THE STATE V. MILLER.

1. **Criminal Procedure: ABSENCE OF STATE'S WITNESSES: CONTINUANCE: FACTS JUSTIFYING.** Where defendant was tried for incest, and after the trial the district attorney allowed the state's witnesses to depart, and the jury failed to agree, *held* that the district attorney's failure to hold the witnesses in anticipation of another trial at the same term was not such negligence as should defeat his motion for a continuance, on the ground of the absence of one of the witnesses whose attendance could not be procured at that term.
2. **Criminal Evidence: INCEST: WHAT IS CORROBORATIVE.** On a trial for incest, evidence may be corroborative of the prosecutrix, and therefore material, without being in *direct* corroboration of her testimony as to the body of the crime. See opinion for example.
3. ———: ———: **FATHER AND DAUGHTER: EVIDENCE TO SUPPORT VERDICT.** The evidence in this case considered, and *held* sufficient to support a verdict that defendant was guilty of incest with his daughter.

The State v. Miller.

4. ———: ———: **CORROBORATION: DUTY OF COURT AND JURY.** On a trial for incest, and in like cases, it is for the court to determine whether or not evidence is corroborative, but it is for the jury to weigh and determine the effect of such evidence.
5. ———: ———: **IMPROPER INTIMACY.** The mere fact of a man's having given money to the prosecutrix in a case of alleged incest is immaterial as evidence of an improper intimacy between them.
6. **Practice: INSTRUCTIONS: REVIEWING TESTIMONY.** Under our practice, it is not practicable nor necessary for the court to take up the several facts and circumstances testified to, by the witnesses, and instruct the jury as to their weight and effect.

Appeal from Marshall District Court.

FRIDAY, OCTOBER 24.

THE defendant was convicted in the court below of the crime of incest, alleged to have been committed by having carnal knowledge of his daughter, Lorada Miller. Defendant appeals.

John H. Bradley, for appellant.

Smith McPherson, Attorney-general, for The State.

ROTHROCK, CH. J.—I. At the January term, 1884, the defendant was put upon trial on the indictment, and the jury failed to return a verdict, because they were unable to agree. After the jury were discharged, the district attorney filed a motion for a continuance of the cause until the next term, based upon the absence of two witnesses. One of these witnesses was present and testified upon the first trial, and the other was a non-resident, and absent from the state. The non-resident witness was one Davis, and it appears from the affidavit that the defendant had made the claim that Davis had sexual intercourse with defendant's daughter, and that he was the father of her illegitimate child. The affidavit of the district attorney was to the effect that Davis would testify that he never at any time had such sexual intercourse

1. CRIMINAL
procedure:
absence of
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facts justify-
ing.

with the prosecutrix. The defendant resisted the motion for a continuance, upon the grounds that the witness who had been in attendance at the first trial should not have been permitted to absent himself until the case was finally disposed of, and that his testimony did not tend to corroborate the testimony of the prosecutrix. As to Davis, the objection was that there was no reasonable expectation that his attendance could be secured at the next term, and that his evidence would not be corroborative, and would be immaterial and incompetent. The motion for a continuance was sustained, to which ruling the defendant excepted. Thereupon, the defendant appeared in open court, and waived the right to confront said witnesses, and admitted that they would testify as stated, and consented that the testimony might be read upon the trial, upon which waiver the motion for continuance was overruled.

It is claimed that the agreement to go to trial and waive the presence of the witnesses was not a waiver of the ruling on the motion for a continuance. Without determining the question as to what was waived by the agreement, we think the showing made for a continuance was sufficient. There was no lack of diligence on the part of the district attorney. The case was one which would quite naturally excite the public mind, and in view of the difficulty of securing a jury to try a case of this character the second time at the same term, we would be slow to disturb an order of continuance upon the ground that the district attorney had permitted the witnesses for the state to absent themselves at the close of the introduction of the evidence upon the first trial. It is claimed that the testimony of Davis would have been immaterial. We think otherwise. It was not necessary that it should be in direct corroboration of the testimony of the prosecutrix as to the body of the crime. The record shows that it was most material in contradiction of the theory of the defense that Davis was the author of the misfortune of the prosecutrix.

2. CRIMINAL
evidence: in-
cest: what is
corrobor-
ative.

II. The sufficiency of the evidence to warrant the verdict is the material question in the case. The evidence shows that the daughter of the defendant was delivered of a child when she was between fifteen and sixteen years of age. The defendant's wife died some years before that, and the defendant and his four children composed the family at the time it is charged the crime was committed. The prosecutrix was the oldest child. She testified, upon the trial, that her father commenced to have sexual intercourse with her when she was about eleven years old, which was continued up to the time she became pregnant, which was in December, 1882; that after she became pregnant he procured medicine for her to produce an abortion; that he told her to say that one Davis was the father of the child. If the testimony of the prosecutrix was, in law, sufficient to sustain a conviction, we would not be warranted in reversing the judgment for want of sufficient evidence. It is true that it appears from her evidence that, upon the first trial, she testified that on every occasion of sexual intercourse the act was accomplished by force, and on the last trial she testified that no force was used excepting during the first years of their illicit intercourse. And she admits that she claimed at one time that Davis was the father of the child. It is strenuously urged in argument that the contradictions render the witness unworthy of belief. That was a question for the jury, and it is not for this court to sit in judgment upon it, in view of the statement which she makes that her father induced her to claim Davis as the father of the child, and in view of the explanation she makes as to her former testimony as to the force used. It is claimed, however, that, conceding that the jury were warranted in giving credence to the testimony of the prosecutrix, there is no other evidence tending to connect the defendant with the commission of the offense sufficient to constitute the corroboration required by statute. We suppose it is a question for the court to determine

3. —: —: father and daughter: evidence to support verdict.

4. —: —: whether there is any corroborating evidence in cases of this character. But it is for the jury to weigh and determine the effect of such evidence, and its sufficiency, and each case must be determined upon its own facts, because, in the nature of things, the corroboration cannot be the same in any two cases. Many cases of this kind have been determined in this court, in some of which it has been held that there was corroborating evidence, and in others that such evidence was not produced. In the case at bar, we think there was evidence other than that of the prosecutrix, which, if believed by the jury, tended, to say the least, to connect the defendant with the crime charged.

We will set out a few of the facts sworn to by witnesses which, we think, have the required tendency. At about the fourth month of the pregnancy of the prosecutrix, the defendant called upon his family physician, and at three different times procured medicine which was intended to bring about the flow of the menses. He told the physician that her menses had ceased, as he thought, by her catching cold. At times he claimed that he did not know of the pregnancy of his daughter until her sickness at the time of the birth of the child. At another time he claimed that he knew it four or five months before that time. He was unwilling that any one should interrogate his daughter about the paternity of the child, saying that he would find out, and that he would make it hot for any one who interfered in the matter. He intimated, and, in fact, claimed that Davis was the father of the child, and when it was proposed to send for Davis he objected. Now, we think these circumstances, and others that might be enumerated, were sufficient to submit to the jury in corroboration of the testimony of the prosecutrix. They indicated pretty plainly that the defendant was determined that the author of the ruin of his child should not be discovered and brought to justice; and we think his contradictory statements and general conduct in regard to the affair warranted the jury in finding that the corroboration was

SAME AS NUMBER 2, ante. sufficient. The corroboration necessary to convict him need not be founded upon facts directly connecting defendant with the offense. It may be founded upon circumstantial evidence. *State v. Stanley*, 48 Iowa, 221.

• III. Upon the cross-examination of the prosecutrix she was asked if Davis had ever given her money, and if the witness had said to Mary Ratliff that Davis had improper intimacy. given her some money, and if she did not show the money to Mrs. Ratliff. The court sustained an objection to the question, because it was immaterial, and not cross-examination. This ruling is complained of. We think the ruling was correct. The mere fact that Davis gave the girl money was immaterial; and, if he did give her money, no inference was allowable therefrom that the giving of money was for any improper purpose, without some proof in that direction. As to such proof, we may say that the evidence does not tend to show any improper intimacy between Davis and the prosecutrix. It appears that Davis visited the defendant's family, and that he had a violin, and played it at times while there. A witness stated that she had seen Davis at the defendant's house on two occasions, and the question was asked her if, at other times, she had heard a violin played in the house. The court sustained an objection to this question. We think this ruling was not erroneous. The testimony which was sought to be called out thereby was so remote from any issue in the case that, whether allowed or not, it could have had no influence in making up a verdict.

IV. The defendant requested the court to give to the jury seventeen instructions, which were all refused. The most of these instructions are recitals of the different facts and circumstances which are claimed to be corroborative of the prosecutrix, coupled with the statement that they do not tend to connect the defendant with the commission of the crime charged. If these instructions had been given, the jury would have been required to

6. PRACTICE:
instructions:
reviewing
testimony.

return a verdict of not guilty. We have said that some of these facts and circumstances were sufficient to submit to the jury, and as to them the instructions would have been manifestly erroneous. And we do not think the court is required in such cases to take up the several facts and circumstances testified to by the witnesses, and instruct the jury as to their weight and effect. Under our practice, written instructions are required, and it is not practicable nor necessary for the court to review the testimony of the witnesses.

V. In our opinion the instructions given by the court to the jury fully and fairly cover every proper question in the case. They call attention to the contradictory statements of the prosecutrix in her testimony upon the two trials, and state that if she intentionally testified falsely she might be discredited altogether, and direct the jury that they "are to judge of her testimony, and determine how far, if at all, she is corroborated or contradicted by herself or others, and give it such credit as it may be entitled to, or none, as you may fairly judge to be right." Counsel for the defendant claims that the instructions are erroneous in that they confine the jury to a consideration of such facts, if any, as to which the witness intentionally testified falsely; and it is further objected that the part of the instructions above quoted authorized the jury to find corroborative facts in the testimony of the prosecutrix. We do not think the instructions are vulnerable to the objections claimed, especially in view of the very full and fair directions elsewhere contained in the charge upon the question of corroboration.

VI. The motion for a new trial was supported by an affidavit of defendant's counsel, in which the district attorney was charged with misconduct in his closing argument to the jury. The district attorney filed a counter-affidavit, in which he claimed that his conduct and argument were highly proper, in view of the fact that it was but a reply to the argument of defendant's counsel. It is unnecessary to set out these affidavits in this opinion. It is enough to say that we do not

The Minnesota Linseed Oil Co. v. Montague & Smith.

discover that the defendant was prejudiced in this regard. It appears from the affidavits that most of this controversy arose out of statements made by counsel as to what occurred at the first trial. The affidavits are contradictory as to which of the counsel was at fault in first departing from a proper line of argument.

We have examined the whole record in the case, and given, as we think, proper consideration to the very able and exhaustive argument of counsel for the defendant, and are united in the conclusion that the judgment of the district court must be

AFFIRMED.

THE MINNESOTA LINSEED OIL COMPANY v. MONTAGUE & SMITH.

1. **Practice in Supreme Court: STARE DECISIS: INSTANCE.** When this court has once definitely passed upon a question in a case, the ruling will not be reconsidered upon a second appeal, unless there have been such changes in the issues, or other circumstances of the case, as to raise a new question as to the applicability of the former ruling to the case as thus made. See opinion for illustration.
2. **Principal and Agent: AMBIGUOUS INSTRUCTIONS: INTERPRETATION.** Where a principal gives to his agent instructions which are susceptible of two meanings, that meaning which the agent in good faith attaches to them and acts upon is to be adopted; and if loss occurs thereby, the principal and not the agent must bear it; and it matters not whether the principal had reason to believe, or not, that the agent so understood the instructions.
3. ———: **REPORT OF AGENT: RATIFICATION BY SILENCE.** Where an agent for disbursing funds makes a report to his principal, showing his disbursements, and accompanied with a draft for the balance in his hands, the principal must within a reasonable time (a question for the jury) examine the report, and make known to the agent any objections which he may desire to make thereto. Failing so to do within a reasonable time, his silence will be treated as a ratification of the agent's disbursements.

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89	24
65	67
103	64
65	67
115	506
65	67
117	194

The Minnesota Linseed Oil Co. v. Montague & Smith.

4. **Instructions: REPETITION NOT REQUIRED.** It is no error for the court to refuse to give a proper instruction asked, when it gives the substance of it in another instruction on its own motion.

Appeal from Franklin District Court.

FRIDAY, OCTOBER 24.

PLAINTIFF brought this suit to recover a sum of money which it claims to have deposited with defendants, to be paid out only on tickets issued by one Valentine, an agent of plaintiff, in the purchase of flaxseed, but which defendants, without authority, paid to said Valentine in payment of certain commissions. Defendants admit that the money was deposited with them, and that they paid it to Valentine for the purpose alleged by plaintiff, but deny that such payment was unauthorized, and allege that it was subsequently ratified by plaintiff. There was a verdict and judgment for plaintiff, and defendants appeal. The cause has heretofore been in this court. See 59 Iowa, 448.

Richard Wilber, for appellants.

Blythe & Markley, for appellee.

REED, J.—I. It is alleged in the petition that the money was deposited with defendants upon a parol contract that it was to be paid out by them only on checks or tickets issued by Valentine, on the purchase of flaxseed. On the trial plaintiff offered in evidence certain letters written by its treasurer to defendants, covering remittances, and which, as plaintiff claims, contained certain specifications as to the manner in which the money remitted should be applied. Defendants objected to the introduction of these letters, on the ground that, as plaintiff had alleged that the contract under which the money was deposited with them was in parol, this written evidence was immaterial and irrelevant, and that it was not shown that the person who

1. PRACTICE
in supreme
court: stare
decisis: in-
stance.

wrote them had any authority from plaintiff to give directions as to the manner in which said money should be disbursed. The objections were overruled, and the letters were read in evidence. We held, on the former appeal, that these letters were admissible. There has been no change in the issues since this ruling was made. The question of the admissibility of the evidence arises on the second trial precisely as it did on the first. When we have once definitely passed on a question in a case, our practice is to reconsider our ruling thereon in that case only on a rehearing, unless there have been such changes of the issues, or other circumstances of the case, as raise a new question as to the applicability of the former ruling to the case as thus made. *Adams Co. v. Burlington & M. R. R. Co.*, 55 Iowa, 94. Our former ruling on this question must therefore be regarded as final, so far as this case is concerned.

II. The original arrangement under which the money was deposited with defendants was made with them by one Harkness, as agent for plaintiff. There was a conflict in the evidence as to the directions given by Harkness at this time as to the manner in which the money should be disbursed. Harkness testified that he directed defendants to pay out money only on tickets issued by Valentine, which should show actual purchases by him of flaxseed; while defendants both testified that the direction was that the money should be paid out generally in the business of purchasing flaxseed for plaintiff, in which Valentine was engaged, and that Harkness informed them at that time that Valentine was to be paid a commission of six cents per bushel on all the seed purchased by him. The evidence shows without conflict that Valentine was entitled, under his arrangement with plaintiff, to receive as commissions on the purchases made by him the amount of money paid him by defendants. The defendants asked the court to give the following instruction, which was refused: "If the language used by plaintiff's agent in employing

2. PRINCIPAL
and agent:
ambiguous
instructions:
interpretation.

defendants, as plaintiff's disbursing agents, to pay off checks made by Valentine, and instructing them as to their duties as such disbursing agents, was fairly capable of two constructions or understandings, or was ambiguous in its meaning, the plaintiff is bound by the understanding which his language fairly and reasonably conveyed to defendants, provided defendants acted in good faith in carrying out such understanding thus fairly and reasonably conveyed to them by the language of plaintiff's agent." Defendants assign the refusal to give this instruction as error. The court on its own motion instructed the jury that, "if the language used by plaintiff's general agent in making the arrangement with defendants was ambiguous, or fairly admitted of more than one construction, that meaning is to be given in which they were understood by defendants, provided plaintiff's said general agent had reason to believe they were so understood by defendants." Omitting the qualification expressed in the last clause, this instruction presents the rule which is embodied in the instruction asked. With the qualification, however, it presents a very different rule. Under the instruction as given, defendants would be liable if they adopted and acted on a construction of the instructions of which they were fairly capable, but which was different from what was actually intended by the agent, and he did not know that they had adopted such wrong construction. This, it seems to us, would be to make the innocent party suffer for the wrong or negligence of another. If the instructions were "ambiguous, or fairly admitted of more than one construction," this was the fault or negligence of the party who gave them, and that party ought in justice to bear the consequence of such negligence, rather than the one who was deceived and misled by it. We think, therefore, that the instruction should have been given without the qualification. *Vianna v. Barclay*, 3 Cow., 281.

III. After Valentine had ceased to purchase flaxseed for plaintiff, and after defendants had paid for all that he had

3. ———: re-
port of agent:
ratification
by silence.

purchased, and had also paid him the money in question in this case, they sent plaintiff a written statement of their account, showing the amounts received and disbursed by them, together with a draft for the amount which was due plaintiff according to the statement, and the checks or tickets on which the disbursements had been made. The amount in controversy had been paid Valentine on tickets which showed on their face that the payments were made on account of his commissions. These tickets were sent by defendants with the statement and the other vouchers. Plaintiff's book-keeper received these papers and the remittances in due course of mail, and wrote defendants, acknowledging the receipt thereof; and no question was made as to the payment to Valentine of his commissions for about four months from the time the remittance and vouchers were received by plaintiff. The book-keeper testified that when he received the statement of account and vouchers he placed them in a safe, where they remained, without being examined or compared, for four months. They were then examined by Harkness, the agent who made the arrangement originally with defendants, and, when it was discovered that the payments had been made to Valentine, this suit was instituted.

The defendants requested the court to give the following instruction: "If the defendants were employed by the plaintiff to disburse plaintiff's money under plaintiff's instructions, and afterwards, when the business was supposed to be closed, the defendants wrote a letter and sent a full statement to plaintiff of their doings as such disbursing agents, it was plaintiff's duty, as defendants' principal, to examine said report in reasonable time, and, if it disapproved of defendants' acts, to answer the letter, or otherwise notify defendants, expressing its dissent; and, if plaintiff failed to do so in a reasonable time after receiving their report, plaintiff will be deemed to approve the acts of defendants as its agents, and silence would amount to a ratification of the acts so reported." The

4 INSTRUCTIONS: repetition not required.

court refused to give this instruction; but, as the same doctrine is fairly expressed in one of the instructions given by the court on its own motion, defendants have no ground of exception because of such refusal. But the court, in addition to the instruction just referred to, gave the following: "Before a principal is bound by the unauthorized act of an agent, it must appear that a full knowledge of the act done by the agent has come to the principal, and that the principal has either expressly, or by unreasonable delay in making objections thereto, ratified the same. If the objection was not made in a reasonable time after knowledge of the act, the act is thereby ratified. What constitutes reasonable time in such cases depends upon the nature and character of the matter to which the time relates, and the circumstances attendant upon or surrounding the persons and transactions involved, the ordinary course of business between the parties, and the customs of trade and business to which the matter to be ratified relates. A reasonable time is such as an ordinarily reasonable and prudent person, under the same or similar circumstances, would deem it necessary and proper to act in; and a failure to so act in such reasonable time is unreasonable delay. The jury must determine, if they find that the payments in controversy were not, prior thereto, authorized by plaintiff, whether such payments were brought to plaintiff's knowledge afterwards, and, if so, whether they were objected to by plaintiff, with notice thereof to defendants, within a reasonable time after knowing of the payments." The giving of this is assigned as error.

In the former instruction, the jury are told in effect that, if plaintiff failed to object to the payments to Valentine within a reasonable time after the statement and vouchers were sent to it by defendants and received by it, its delay in this respect should be treated as a ratification of the payments, and would defeat a recovery; while the doctrine of the latter instruction is that such silence would not amount to a ratification of the payments, unless it had full knowledge at

the time that they had been made. These propositions are inconsistent. Plaintiff did not have full knowledge that the payments had been made until the statements of account and vouchers were examined and compared by Harkness, which was four months after it received them. And we think that, while the latter instruction may be correct as an abstract proposition, it requires some qualification to make it applicable to the facts of this case. When plaintiff received the statement of account and vouchers, it knew, of course, to what they related. It was entitled to a reasonable time after their receipt within which to examine and compare them. But, if it neglected to do this within a reasonable time, its neglect in this respect ought to be treated as amounting to a ratification of what had been done. When defendants sent the statement of account, they had the right to expect that it would receive attention within a reasonable time, and that what they had done would be disapproved, if at all, within such time. What would be a reasonable time is, of course, a question of fact for the jury, as we held on the former appeal. But if plaintiff neglected to examine and compare the account and disapprove these payments within a reasonable time, it ought not to be heard to say that it was not fully informed as to the facts, and that its silence for that reason should not be treated as amounting to a ratification of said payments. Story Ag., § 258. *Bell v. Cunningham*, 3 Pet., 69; *Cairnes v. Bleecker*, 12 Johns., 300; *Vianna v. Barclay*, 3 Cow., 281.

For the errors pointed out the judgment of the district court is reversed, and the cause will be remanded for a new trial.

REVERSED.

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79	636

THE PALO ALTO BANKING AND INVESTMENT CO., FOR ITSELF
AND OTHERS, V. MAHAR ET AL.

1. **Injunction; PRACTICE: MOTION TO DISSOLVE: AFFIDAVITS.** Under section 3399 of the Code, where an injunction has been allowed without an opportunity to defendant to show cause against it, defendant may, *upon his answer alone, without affidavits*, move the judge for its vacation; and in such case the plaintiff may support his petition by affidavits.
2. **Equity: JURISDICTION: FRAUD AND CONSPIRACY: INJUNCTION.** Equity will grant an injunction to defeat a fraudulent conspiracy, wherein a deed is sought to be defeated on the false claim that it was forged, and is therefore void; and in such case it will not be particular to inquire whether the conspiracy might not be defeated by some other remedy.
3. **Parties: COMMON INTEREST: SUIT BY ONE FOR BENEFIT OF ALL:** Code, § 2549. Where the parties interested are numerous, and it is impracticable to bring them all before the court, and they have a common interest in the subject of the litigation, arising from the fact that they all hold land under the conveyance which defendants fraudulently seek to defeat, one of them may prosecute an action for the benefit of all, to enjoin the consummation of the fraud, under Code, § 2549,—following *Brandriff v. Harrison Co.*, 50 Iowa, 164; *Fleming v. Mershon*, 36 Iowa, 413, distinguished.
4. **Injunction: FRAUDULENT CONSPIRACY: PARTIES.** One who is about to receive a conveyance of land, in consummation of a conspiracy to defraud the true owner thereof, is a proper party defendant to an injunction suit to defeat the conspiracy.
5. ———: ———: ———: **INNOCENT PUBLIC OFFICER: COSTS.** In such a case it is proper to make the county recorder a party, and to enjoin him from recording the fraudulent conveyance, though no charge of fraud is made against him; but he should not be adjudged to pay any costs.
6. **Practice in Equity: RELIEF UNDER GENERAL PRAYER.** Where a petition in equity, besides asking for an injunction, makes the broad and general prayer for all equitable relief to which plaintiff is entitled, the court's power to grant relief is as broad and general as the prayer.
7. **Equity: SUIT BY ONE FOR BENEFIT OF MANY: PARTIAL RELIEF: OBJECTION BY DEFENDANTS.** It is not for defendants to defeat an action on the ground that the persons for whose benefit plaintiff sues will not obtain full relief therein.

Appeal from Palo Alto Circuit Court.

FRIDAY, OCTOBER 24.

ACTION in chancery to enjoin defendants from conveying certain lands described in the petition. A temporary injunction was allowed, and after answer a motion to dissolve it, made at chambers, was overruled. From the order overruling this motion defendants appeal.

John Jenswold, Jr., and Thomas F. Taylor, for appellants.

Soper, Crawford & Carr, for appellees.

BECK, J.—I. The petition, which is duly verified, alleges that defendant Mahar, who was the owner of the lands in question, conveyed them in 1861 to one Griffin by a valid deed of warranty, acknowledged and recorded as required by law; that Austin Corbin and John Lawler acquired title to the lands under Griffin, and in 1874 caused the lands, or a large portion thereof, to be laid off and platted as village lots, and the whole of the premises was made an addition to and became a part of the town of Emmetsburg; that Corbin and Lawler conveyed the lots to plaintiffs named in the petition, and to others, for whose benefit the action is prosecuted, who have made thereon permanent improvements of great value; that in the deed executed by Mahar to Griffin certain errors and irregularities appear, which render it technically defective; and that Mahar claims that the deed was not executed by him, and is a forgery. The petitioner further alleges that the deed was executed and delivered by Mahar for a sufficient consideration; that Mahar has all the time been a resident of the county, and has not heretofore made any claim that his deed is invalid, or that he holds any title or interest in the property; that the defendants, conspiring together, are fraudulently attempting to deprive plaintiff of the property by means of a conveyance by Mahar to defendants, Jenswold & Taylor, who discovered the irregularities in the deed to Griffin, and that conveyances of the property are about to be made by defendants to innocent parties. The recorder of deeds

of the county, Walsh, is made a defendant, but no charge of fraud, or anything illegal or improper, is made against him. The defendants answered the petition, denying its allegations, and thereupon moved, at chambers, to dissolve the injunction. The plaintiff, at the hearing of the motion, filed affidavits in support of the allegations of its petition. We will proceed to the consideration of the objections urged by defendants to the rulings of the circuit judge upon the motion, as well as his order overruling it.

II. It is first insisted that the circuit judge erroneously permitted plaintiffs to present affidavits in support of its petition, and erroneously considered the proof produced in that manner. The statute provides that where a temporary injunction has been allowed, without an opportunity to defendants to show cause against it, an application may be made, to the judge allowing the injunction, to vacate it. Code, § 3399. "Such application must be with notice to the plaintiff, and may rest upon the ground that the order was improperly granted, or it may be founded upon the answer of defendants and affidavits. In the latter case, the plaintiff may fortify his application by counter-affidavits, and have reasonable time therefor." Section 3400. This section provides that the motion may be based upon two grounds: *First*, the improper granting of the injunction, which would occur if, upon the face of the petition, it shows that the plaintiff is entitled to no relief, or if the writ was issued irregularly, or in proceedings wherein it is not authorized by law; *Second*, the answer of defendants and affidavits, denying the allegations of the petition, and contradicting the facts therein set out as grounds of relief. When the motion is based upon the grounds last specified, *i. e.*, the denial of the allegations of the petition by answer and affidavits, the plaintiff may file *counter-affidavits*; that is, affidavits which are contrary to or against the matters set up by defendant. This the circuit judge permitted in this case. Counsel for defendants insist that counter-affidavits

1. INJUNCTION: practice: motion to dissolve: affidavits.

cannot be filed by a plaintiff to support his petition, unless both an answer and affidavits are filed by the defendant. If this be so, then a defendant cannot base a motion to dissolve upon an answer alone, for it is plain that counter-affidavits, in all cases wherein the motion is based upon the denial of the facts alleged by the petition, may be filed. This conclusion, if correct, would defeat defendants' motion, for they filed no affidavits. But it cannot be doubted that the defendant may base his motion on the answer alone, and in that case the petition may be supported by affidavits.

III. It is urged that equity will not interfere to enjoin a party from conveying any interest he may hold in land, and

2. equity: jurisdiction: fraud and conspiracy: injunction.	will not permit the writ of injunction to be used as a remedy to settle titles. These principles, and others stated in connection with them, may be admitted. But they leave out of view the doctrine that equity will use all of its powers to circumvent fraud, and will delight to use the writ of injunction to defeat conspiracy. This is not a simple case of conflicting titles and claims to land, as presented by the petition, but is a case of fraudulent conspiracy, wherein a deed is sought to be defeated on the false claim that it was forged, and is therefore void. The defendants, other than the recorder, are charged with a corrupt confederation to make and accept deeds with the intention of transferring their title to innocent purchasers. The prejudice resulting to plaintiff is alleged in the petition, and, indeed, would be presumed, in the absence of allegations thereof. Equity will not, in such cases, be particular to inquire into the precise effect of the fraud, or whether there may not be some other remedy than by injunction which will defeat it. The fraudulent confederation being shown, equity will lay its hand heavily upon the conspirators, and arrest their efforts to wrong their intended victims. The familiar doctrines upon which these conclusions are based need no support by citations from adjudged cases.
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The Palo Alto Banking and Investment Co. et al. v. Mahar et al.

IV. Counsel for defendants contend that plaintiff is not authorized to prosecute this action for the benefit of other persons for whom they sue, and that these persons and plaintiff cannot be joined in the action. Code, § 2549, provides that, "when the question is one of a common or general interest to many persons, or when the parties are very numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the whole." The petition avers the existence of facts which bring the case within this provision. It shows that the parties interested are numerous; that they have a common interest in the subject of the litigation, arising from the fact that they all hold land under the conveyance which defendants seek fraudulently to defeat. Counsel cite *Fleming v. Mershon*, 36 Iowa, 413, in support of their position, upon the supposition that it decides that several tax-payers cannot unite in the prosecution of an action to enjoin the collection of an illegal tax. The question upon which the case is cited was not decided by a majority of the court, two justices only concurring therein. Another justice dissented, and a fourth withheld his concurrence upon the point, expressing no opinion thereon. The case was decided upon another point. In *Brandirff v. Harrison County*, 50 Iowa, 164, in an opinion concurred in by all the justices, this court announced the contrary doctrine, holding that an action to restrain the collection of a tax could be jointly prosecuted by several tax-payers. It cannot be denied that, in a case wherein parties may jointly sue, one may prosecute an action for the benefit of others having a common interest, as contemplated by Code, § 2549.

V. It is insisted by counsel for defendants that the petition shows no cause for an injunction against Jenswold and Taylor. We think differently. It alleges that these defendants are about to receive a conveyance of the property, and are conspiring with

3. PARTIES:
common in-
terest: suit
by one for
benefit of all:
Code, § 2549.

4. INJUNC-
TION: fraud-
ulent conspir-
acy: parties.

Mahar to defraud plaintiffs. This allegation is supported by the affidavits filed by plaintiffs.

VI. It is urged that defendant, Walsh, cannot be restrained from the discharge of official duties which the law requires him to perform as recorder of deeds. 5. —: —: An officer may be made a party to an action to restrain him in the performance of official duties, when the discharge of these duties will be the means of consummating or aiding fraudulent purposes, or of working oppression or injustice. While the officer is guilty of no wrong or unlawful purpose, his official act may result in wrong, and through it fraudulent conspiracies may be carried out. He will be restrained from acting, but no costs will ordinarily be adjudged against him. The collection of taxes, the execution of deeds by sheriffs and county treasurers, and like official acts, may be restrained in actions wherein the proper officers are made parties.

VII. It is lastly insisted that the circuit judge erred in not sustaining the motion, for the reason that the petition does not seek an adjudication of the title. 6. PRACTICE in equity: relief under general prayer. Counsel seem to think that the only relief claimed in the petition is an injunction. It is difficult to see how an injunction could be made, upon trial, perpetual, without an adjudication of all the facts upon which it is prayed. These involve the title of the property. Hence, the title, of necessity, must be adjudicated in the action. But the plaintiff makes the broad and general prayer for all equitable relief to which it is entitled, as well as for an injunction. Under this prayer, it can, if it shows itself entitled to it, have a decree quieting its title in the lots owned by it. So the decree can quiet the title of all persons for whose benefit it sues. See Story, Eq. Pl., §§ 40, 41.

VIII. Counsel for defendants suggest difficulties as to the form and effect of a decree granting relief upon the

7. **EQUITY:** petition in this case. We think they do not ex-
 suit by one ist. If the evidence authorize such relief, the
 for benefit of many: partial court, upon the final hearing, may certainly
 relief: objec- quiet the title in plaintiff, and perpetually enjoin
 tion by de- defendants from conveying the lands or receiving convey-
 fendants. ances therefor, and may restrain the recorder from recording
 any conveyances made by or to defendants for the lands or
 any part thereof. The plaintiff will be entitled to full relief,
 and the persons for whom it sues will receive relief, so far as
 it can be given, by enjoining the execution and recording of
 deeds. It is certain that the relief may go thus far, and it
 is possible that it may go farther and quiet the title of all
 persons claiming under Mahar's deed to Griffin. But this
 point we do not decide. Plaintiffs, by amendments, may
 bring all parties interested before the court, and other pro-
 ceedings may be had which will effectuate justice. It is not
 for defendants to defeat the action on the ground that the
 persons for whose benefit plaintiff sues will not recover full
 relief. We have considered, as fully as their character de-
 mands, all questions argued by counsel, and reach the con-
 clusion that the order of the judge of the circuit court
 ought to be

AFFIRMED.

65	80
79	602

65	80
121	427

65	80
d133	222

65	80
139	413

BLACKMAN ET AL. V. WADSWORTH ET AL.

1. **Estates of Decedents: DEVISEE DYING BEFORE TESTATOR: WHO ARE HEIRS OF: CODE, §§ 2337, 2454.** Where a devisee dies before the testator, leaving a widow and a brother, the brother is, but the widow is not, an heir of the devisee, within the meaning of section 2337 of the Code, and in such case the legacy goes to the brother. *McMenomy v. McMenomy*, 22 Iowa, 148, and *Will of Overdieck*, 50 Id., 244, distinguished. And held, further, *arguendo*, that the word "heirs," as used in sections 2337 and 2454 of the Code, has the same meaning.

Appeal from Mitchell Circuit Court.

FRIDAY, OCTOBER 24.

THIS is a controversy without action, submitted upon an agreed statement, under chapter 10 of title 20 of the Code. The question presented arises under the will of George Briggs, deceased. The parties differ as to whether a certain legacy has lapsed or not. The devisee whose legacy is in controversy, Henry H. Blackman, died before the death of the testator, leaving, as his widow, the plaintiff, Nellie Blackman, and leaving his brother, the plaintiff, Charles M. Blackman, and leaving no other brother, and no child, parent, nor sister. It is conceded that, if the legacy has not lapsed, it should either be divided between the widow, Nellie, and the brother, Charles M., or go to Charles M. alone; and, if it has lapsed, it should go to the residuary devisees, who are the defendants, Hester A. Wadsworth, Daniel M. Briggs, and the brother, Charles M., above mentioned. The court below held that the legacy had lapsed. Charles M. and Nellie Blackman appeal.

Cyrus Foreman, for appellant.

F. F. Coffin, for appellees.

ADAMS, J.—The determination of the question presented depends upon whether the widow, Nellie, and brother, Charles M., are to be regarded as the heirs of the deceased devisee, within the meaning of the word “heirs,” as used in section 2337 of the Code. That section is in these words: “If a devisee die before the testator, his heirs shall inherit the amount so devised to him, unless, from the terms of the will, a contrary intent is manifest.” It is undisputed that, if the devisee had survived the testator and died, the legacy would have become a part of his estate, and would have been distributed to his widow, Nellie, and his brother, Charles M. It is undisputed, also, that Charles M. is the heir of the deceased devisee within the ordinary meaning of the word “heir.” The defendants, Hester A. Wadsworth and Daniel M. Briggs, residuary devisees, contend that in no

proper sense is a widow the heir of her deceased husband, and that, while it is true that a brother, under some circumstances, is the heir of a deceased brother, he is not such within the restricted meaning which the word "heirs" should be deemed to have in the statute above cited. They contend that the word "heirs," as thus used, means children, and they cite in support of this position *McMenomy v. McMenomy*, 22 Iowa, 148, and *Will of Overdieck*, 50 Id., 244. A careful examination of these cases, however, will show that they do not go to the extent claimed. The most that can be said is that there is a slight intimation in the first case that the court thought that the word "heirs" in a different section, to-wit, section 2437 of the Revision, should be limited to children; and, in the last case, that there was no substantial difference in the use of the word in that section and the use of the same in that which provides for the legacy of a deceased devisee. But in neither case does the court say that the word is limited to children. In the last case, it is true, it was held that the legacy went to a brother of the deceased devisee, as residuary devisee, and on the theory that the legacy had lapsed; and it appears that there were two sisters of the deceased devisee, and they had been made parties. But the question presented was as to whether the executor should pay the legacy to the mother, as heir of the deceased devisee, or to the brother, as residuary devisee. The mother and brother appeared, and set up their respective claims. The sisters did not appear, and, by failing to appear, they tacitly conceded that, so far as they were concerned, either the claim of the mother or that of the brother should be sustained. The only ruling constituting any authority is that the mother could not take. The ruling that the brother took *as residuary devisee*, and on the theory *that the legacy had lapsed*, was, under the circumstances of the case, substantially a correct ruling.

We desire to say a word, in passing, upon the ruling respecting the mother. It was based upon *McMenomy v.*

McMenomy, but there are reasons why it should not have great influence in the determination of the case at bar. What the court held in *McMenomy v. McMenomy* was that the widow took nothing from her deceased husband's estate by reason of a child which had been born to them, but which had died before its father died. There was certainly no reason in the nature of things why the widow's share should be greater by reason of such prior deceased child, and it had never been the practice, we think, to allow her share to be increased by reason of such child. It was accordingly held, and perhaps correctly, that the word "heirs," as used in section 2437 of the Revision, did not include the mother of the deceased child. It cannot be denied, we think, that the ruling involved a rather strained construction of the statute. Later, the statute was changed, and the mother is now precluded from such inheritance by a plain and unambiguous provision. It is now expressly provided that the share of a prior deceased child shall be disposed of in the same manner as if it had taken the share and outlived *both* parents. Code, § 2454, last clause.

If the case of *McMenomy v. McMenomy* had arisen under the present statute, it would have involved no construction of the word "heirs," and the word would have been allowed to have its full and ordinary meaning. It is true, the *Overdieck Case* arose under the present statute, and the strained construction was still adhered to, under the supposition that the case of *McMenomy v. McMenomy* required it. But the consideration above mentioned was not brought to our attention. We are now asked to go still further, and apply the ruling in *McMenomy v. McMenomy* to the case of a brother, and hold that he is not an heir, and that, too, notwithstanding the change of statute above mentioned, and notwithstanding that the reasoning on which the ruling in *McMenomy v. McMenomy* is based has scarcely any application. Where a word like the word "heirs" has a plain and well-recognized meaning, we ought certainly, as a gen-

eral rule, to adopt that meaning; and we should not be justified in adopting any other, except for reasons of a very cogent character. We do not discover such reasons in the case at bar, and conclude that Charles M. Blackman is the heir of his deceased brother, Henry H. Blackman, within the meaning of the statute in question. While we hold that the brother is heir, we are disposed to hold that the widow is not. We do not forget that she does not now take as doweress, but takes under a statute of distribution, in the same manner as heirs do. In one or two cases we think that she has been called by this court the heir of her deceased husband. But the question is not as to what she is now called, or might properly be called, but what she was called at the time of the origin of the statute in question, and of a cognate statute.

Section 2337 of the Code is a literal copy of section 2319 of the Revision. Under the Revision the widow took dower. She was certainly not at that time generally designated in common parlance as an heir, and we cannot think that the legislature at that time intended that she should be included in the term "heirs," as that word is used in the section last above cited. It may be thought by some that while the word "heirs," as used in section 2319 of the Revision, may not include the widow, the word as used in the corresponding section of the Code does. Some reasons might be urged in support of this position, and possibly we might think that it should be sustained, but for another consideration which we will proceed to mention. We look upon sections 2337 and 2454 of the Code as cognate provisions, so far as the use of the word "heirs" is concerned. We have already said this in the *Overdieck Case*. We think that the legislature designed to treat the legacy of a prior deceased devisee in the same manner as the share of a prior deceased child of an intestate. If this is so, the word "heirs" must have the same meaning in section 2337 as in section 2454. Now, we think that it has never been understood that a

The State v. Pierce.

widow takes from the estate of her husband's father, dying intestate subsequently to her husband. If she could thus take, it would happen that a woman who had had several husbands, all, or all but one, of whom had died, leaving fathers surviving, might find herself enjoying an extended heirship for which nothing in her circumstances would seem to call. The widow, upon the death of her husband, sustains no legal relation to his father. She often, probably, becomes more or less estranged, and especially if her husband dies without issue. Other ties reassert themselves, and a different union may be formed.

If we should hold that the word "heirs," as used in section 2454, includes the widow, we think that we should not only surprise the profession, but invalidate numerous titles which had been supposed to be unquestionable. Not feeling willing to give the word "heirs" a different meaning as used in section 2337, we have to say that we think that Nellie Blackman does not inherit any part of the legacy in question, and that Charles M. Blackman inherits the whole. Upon Nellie Blackman's appeal the judgment must be affirmed, and upon Charles M. Blackman's appeal the judgment must be

MODIFIED AND AFFIRMED.

THE STATE V. PIERCE

65	85
118	675

1. **Criminal Law: NUISANCE: SALOON: INDICTMENT: INSTRUCTIONS: PROOF.** Under section 4091 of the Code, a saloon-keeper who *but once* permits drunkenness, quarreling, fighting, and breaches of the peace to occur in his saloon, to the disturbance of others, is guilty of keeping a nuisance. And so far as the language of the indictment in this case charged a repetition of such disturbances, it was surplusage, and proof of a single disturbance was sufficient to support a verdict of guilty; and an instruction to that effect is approved.
2. ———: **DRUNKNESS DEFINED.** A person is drunk in legal sense when he is so far under the influence of intoxicating liquors that his passions are visibly excited or his judgment impaired by the liquor.

3. ———: NUISANCE: SALOON: PLACE OF DISTURBANCE: EVIDENCE. On the trial of a saloon-keeper for nuisance, the state is not confined to proof of disturbances within the building, but may show that drunkenness, quarreling or fighting occurred at the place, but without the building, if they occurred with defendant's permission, or were occasioned by the business which he was carrying on in the building; (*State v Webb*, 25 Iowa, 235;) but the fact that liquor sold by him was carried away and consumed elsewhere is immaterial.
4. ———: ———: ———: EVIDENCE. In such a case, it is competent for the state to show that persons, immediately after leaving defendant's place, appeared to be intoxicated; for such evidence would tend to prove that drunkenness was permitted at such place.
5. ———: REASONABLE DOUBT: INSTRUCTION, CONSIDERED AS A WHOLE, APPROVED. An instruction is not to be reviewed in detached sentences, but as a whole; and, when so considered, the instruction in this case, (see opinion,) defining a reasonable doubt, and stating the effect thereof, is approved.

Appeal from Mitchell District Court.

FRIDAY, OCTOBER 24.

THE defendant was convicted of the crime of nuisance, and sentenced to pay a fine and the costs of the prosecution, and from this judgment he appeals.

L. M. Ryce, for appellant.

Smith McPherson, Attorney-general, for the State.

REED, J.—I. The offense of which defendant is accused is defined by section 4091 of the Code. The section is as follows: "Houses of ill-fame, * * * gambling-

houses, or houses where drunkenness, quarreling, fighting, or breaches of the peace are carried on or permitted, to the disturbance of others, are nuisances. * * *

1. CRIMINAL
law: nul-
sance:
saloon: in-
dictment: in-
structions:
proof.

The indictment charges that defendant kept a house, and occupied the same as a brewery and saloon, where drunkenness, quarreling, fighting, and breaches of the peace were carried on, and by the defendant permitted *to be carried on*, to the disturbance

of others. The district court instructed the jury, in effect, that defendant might be convicted on proof that he kept the place described in the indictment, and that drunkenness, quarreling, etc., were carried on there, or were permitted by him, to the disturbance of others. Counsel for defendant takes exceptions to this instruction. His position is that to render the place a nuisance, under the section quoted above, the drunkenness, etc., must be either carried on or permitted to be carried on there; that is, there must be a recurrence at the place of the acts enumerated in the section, or some of them, in order to make it a nuisance, and that it would not be given that character by a single transaction; but that, under the instructions, defendant might be convicted on proof that he permitted said acts to be done at his place on a single occasion. We think, however, that this position is not correct. The construction put upon the section by the district court gives to the language its natural and fair meaning. The people of a community may be greatly disturbed and annoyed by a single assemblage of drunken men in their midst, or by fighting and quarreling there, although it should occur but once. The object of the statute is to protect them from the disturbance and annoyance which would be occasioned by the occurrence of such events in their midst; and the evident intention of the legislature in enacting it was to provide for the punishment of men who should permit such acts to be done in buildings or places under their control, to the disturbance of others.

Another position urged by counsel is that, as the charge in the indictment is that defendant permitted the drunkenness, etc., to be carried on at his place, the state should have been required to prove the offense as thus charged, and that defendant ought not to be convicted on proof of a different state of facts. This position, stated in another form, is that the indictment charges that defendant permitted drunkenness, etc., to occur at his place on more than one occasion, whereas, under the instructions, he may be convicted on proof that he

permitted it but once. But if the offense may be committed by permitting the occurrence of the acts on one occasion, we know of no reason why he should not be convicted on proof of a single transaction, although the indictment charges that he permitted them on various occasions. If the effect of the averment is, as counsel claims, to charge that defendant permitted drunkenness, etc., to occur at his place on more than one occasion, it necessarily includes what is covered by the instructions of the court, and more. But, as the facts stated in the instructions constitute the offense intended to be charged and actually charged in the indictment, whatever in addition to that is included in the averment is mere surplusage, and need not be proven.

II. The court instructed the jury that "a person is drunk in legal sense when he is so far under the influence of intoxicating liquor that his passions are visibly excited or his judgment impaired by the liquor." This definition is excepted to by defendant's counsel, but we think it is clearly correct, and it is in accordance with the definitions of drunkenness given in the authorities. See 1 Bouv. Law Dict., 510.

III. Defendant was a witness in his own behalf, and testified that he frequently sold beer to parties who drank it in the immediate vicinity of his place; also that he sold to parties who carried the beer entirely away from the place. In passing on the admissibility of the evidence, the court made the following observations in the presence of the jury: "The amount of beer that was taken away and drank in Osage or Mitchell, or any of the towns about here, I don't think would be material; but the amount that might have been sold by him and drank along the river there, or near by, and parties near to the brewery, might be a material question if they became intoxicated and were seen afterwards. That might be material, but what was drank elsewhere, or sold to be drank elsewhere, I don't think would be. The proportion we need not go into." Defend-

2. — :
drunkenness
defined.
3. — : nul-
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The State v. Pierce.

ant assigns this action of the court as error, but we think it affords him no just cause of complaint. The rule stated by the court in the remarks is undoubtedly correct. The state was not confined to proof of what took place in defendant's building. It might show that drunkenness, quarreling, or fighting occurred at the place, but without the building, if they occurred by defendant's permission, or were occasioned by the business which he was carrying on in the building. *State v. Webb*, 25 Iowa, 235. But the fact that some portion of the beer sold by him was carried away from the place and consumed elsewhere, could have no bearing on any question involved in the case.

IV. The state was permitted to introduce evidence tending to prove that the appearance and conduct of persons who 4. —: —; had been at defendant's place, after they left
—: evi- there, indicated that they were intoxicated. The
—: dence. court instructed the jury that this evidence could be considered by them only in determining whether the parties became intoxicated at the defendant's place. That the evidence was competent for the purpose for which it was admitted we think there can be no doubt. One of the ultimate facts which the state undertook to establish was that drunkenness was carried on or permitted at the place in question; and if it could show that persons who came from the place, by their actions and appearance immediately after they left there, indicated that they were intoxicated, this certainly would have some tendency to establish that fact.

V. The court gave the following instruction: "If there is a reasonable doubt of the defendant being proved guilty, 5. —: he must be acquitted. In criminal cases, full and
reasonable satisfactory proof of guilt is required. No mere
doubt: instruction, weight of evidence will warrant a conviction,
considered as a whole, approved. unless it be so strong and satisfactory as to remove
from your minds all reasonable doubt of the guilt of the accused. In considering this case, you should not go beyond the evidence to hunt for doubts, nor should you entertain

such doubts as are merely chimerical or based on groundless conjecture. *A doubt, to justify an acquittal, must be reasonable, and arise from a candid and impartial consideration of all the evidence in the case, and then it must be such a doubt as would cause a reasonable, prudent, and considerate man to hesitate and pause before acting in the graver and more important affairs of life.* If, after a careful and impartial consideration of all the evidence in the case, you can say and feel that you have an abiding conviction of the guilt of the defendant, and are fully satisfied of the truth of the charge, then you are satisfied beyond a reasonable doubt."

Counsel excepts to that portion of the instruction which is in italics, particularly to the latter clause. If the clause objected to could be considered as entirely distinct from the balance of the instruction, we might not be disposed to approve it. But the instruction should be considered as a whole. It is not fair or just to select a single sentence or phrase from an instruction, and say that the sentence or phrase thus selected is incorrect. We should look rather at the whole of the instruction, and consider whether it, as a whole, enunciates a correct rule, and, looking at the instruction in question as a whole, we think it is not objectionable. The jury are told, in effect, that they are not to convict the defendant unless they are satisfied by the evidence to a moral certainty that he is guilty. What we have said as to the objection to this instruction applies with equal force to the objections urged by counsel to other instructions. They are mere criticisms of single sentences or phrases used in the instructions, and do not deal with the instruction as a whole. We have examined the charge of the court with care, and we think it fully and fairly presents the law of the case. We have also examined the whole record, and we do not find that it contains any error prejudicial to the rights of the defendant. The judgment of the district court is, therefore,

AFFIRMED.

KNAPP V. THE SIOUX CITY & PACIFIC R'Y CO.

1. **Practice in Supreme Court: QUESTIONS PASSED UPON BELOW ALONE CONSIDERED: INSTANCE.** Where defendant, for a special reason stated, going to the merits of the case, moved the court to direct the jury to return a verdict in its favor, and the court did so, it must be presumed that it did so for the reason stated; and if that reason was not good in law, the ruling must be reversed, even though it may be urged (for the first time) in this court that the ruling was right for another reason, viz., a variance between the petition and evidence; for, if the motion had been sustained by the trial court for that reason, plaintiff would have had the right to cure the variance by amendment.
2. **Railroads: RISKS ASSUMED BY ENGINEER: PROXIMATE CAUSE OF INJURY: RULE APPLIED.** The plaintiff was one of defendant's locomotive engineers, and sues on account of injuries received in reversing his lever at a time when, on account of the alleged defect of the road, the train left the track. *Held* that, while the ordinary hazards of reversing the lever were assumed by plaintiff as a part of his employment, yet, if the negligence of defendant required such act to be done at that particular time, and the plaintiff was not guilty of negligence, but, on the contrary, acted prudently, with due regard to his own safety and the safety of others, then defendant is liable, because its negligence was the proximate cause of the injury. See authorities cited in opinion.

Appeal from Pottawattamie District Court.

FRIDAY, OCTOBER 24.

THE plaintiff is a locomotive engineer, and was in the employ of the defendant, and the petition states that while the plaintiff, as such engineer, was in charge of a locomotive drawing a train of cars over defendant's road, the "locomotive and train were thrown from the track," and the plaintiff's right arm broken; that the "accident was caused by negligence and the faulty construction of the track; * * * that the ties were rotten, and insufficient to hold the sleepers and rails, or weight of a passing train;" and that the accident was not caused by the negligence of the plaintiff. The material allegations of the petition were denied. Trial by

65	91
81	268
65	91
83	238
65	91
d107	292
65	91
118	304
65	91
122	496
65	91
124	51
65	91
d131	706

jury, and judgment for the defendant. The plaintiff appeals.

Sapp, Lyman & Pusey, for appellant.

Wright & Baldwin and *Joy, Wright & Hudson*, for appellee.

SEEVERS, J.—I. The material question presented in this record is whether the negligence of the defendant was the proximate cause of the injury received by the plaintiff. The evidence tended to show that the rails spread, and a portion of the train left the track. The locomotive remained, at least partly, on the track. The train consisted of the engine and several freight cars. When the plaintiff found the train was about to run off, or that a portion of it was off the track, he caught the lever, and in reversing it his arm was broken. His object in reversing the lever was to check as soon as possible the speed of the train. At the conclusion of the plaintiff's evidence, the defendant filed a motion which is in these words: "Now comes the defendant and moves this court to instruct the jury to return a verdict for the defendant, and for grounds of said motion states: (1) That the undisputed testimony discloses that the injury for which the plaintiff seeks to recover in this case was received by plaintiff while reversing his engine, and that the risk of accident in the operation of the engine is one incident to the employment, for which plaintiff has no right of action; (2) That plaintiff has not shown that the defective ties and track occasioned the injury complained of, but that the same occurred and was sustained while reversing the engine." The motion was sustained, and the jury instructed accordingly.

It will be observed that the petition states that the accident which caused the injury was caused by the locomotive and train being thrown from the track, and counsel for the appellee insist that the evidence shows that the engine did

1. PRACTICE
in supreme
court:
questions
passed upon
below alone
considered:
instance.

not leave the track, and that it affirmatively appears that the injury was the result of the act of the plaintiff in reversing the lever, and therefore there is a material variance between the allegations of the petition and the proof. For this reason it is insisted that the court rightly directed the jury to find for the defendant. It must be presumed that the court gave the direction asked on the grounds stated in the motion. It does not appear therefrom that the defendant claimed in the district court that there was a variance, and that for this reason the jury should be directed to find for the defendant. Such question cannot be raised for the first time in this court. Had the motion been based on such ground, the right to amend would have existed. It would be manifestly unjust to deprive the plaintiff of such right. This, however, would be the effect, if we should affirm the judgment of the district court.

II. The plaintiff was injured while he was reversing the lever. There is no evidence tending to show that this was rendered more difficult because the train, or a portion of it, was off the track. If the lever had not been reversed, it cannot be said that the plaintiff would have been in any respect injured. It must, however, be assumed that when a train leaves the track the lives of the employes are endangered. The lever is moved forward, as we understand, for the purpose of starting the train or increasing its speed, and is reversed when it is desired to stop the train as speedily as possible. This forward and backward movement of the lever, no doubt, frequently occurs in a day's run. The use, therefore, of the lever must be regarded as one of the incidents and hazards of the plaintiff's employment, and for an accident happening by such use, by which the engineer is injured, it will be conceded that the defendant cannot ordinarily be held liable. The immediate cause of the injury received by the plaintiff was the reversal of the lever. The lever was reversed because the train left the track, and this was caused by the spreading of

2. RAIL-
ROADS: risks
assumed by
engineer:
proximate
cause of in-
jury: rule
applied.

the rails caused by the defective condition of the track. There was, therefore, a combination of immediate causes remotely preceded by others. No event can occur, it is believed, which is entirely independent. "The links in the chain of causation are endless." The law has adopted a practical rule that the proximate cause of an injury only can be recognized. When it is ascertained, further inquiry is closed. The real difficulty lies in the application of the rule. An eminent judge has said: "The general rule of law, we understand, is that, where two or more causes concur to produce an effect, and it cannot be determined which contributed most largely, or whether, without the concurrence of both, it would not have happened at all, and a particular party is responsible only for the consequences of one of these causes, a recovery cannot be had, because it cannot be judicially determined that the damage would have been done without such concurrence, so that it cannot be attributed to that cause for which he is answerable." SHAW, C. J., in *Marble v. City of Worcester*, 4 Gray, 395. The same rule has been more briefly stated by BECK, J., in *Dubuque Wood & Coal Ass'n v. City and County of Dubuque*, 30 Iowa, 176. Conceding this to be a correct statement of the law, we have to inquire whether the district court correctly applied it to the facts of this case, and we feel constrained to say that, in our opinion, it did not.

Ordinarily, trains remain on the track. If they do not, it must, ordinarily, be assumed that it is caused by the negligence of some one, unless the accident appears to have been inevitable. In this case it must be assumed that the negligence of the defendant caused the train to leave the track. The plaintiff was called on in a sudden emergency to act. It cannot be expected that he would remain passive. He was justified in so acting as to best protect himself and preserve the property under his charge. If he had sprung from the engine to the ground and been injured, he undoubtedly could have recovered, provided he acted prudently in so doing. *Buel v. New York Cent. R. Co.*, 31 N. Y., 314; *Coulter v.*

American M. U. Exp. Co., 5 Lans., 67. Instead of doing this, he concluded to reverse the lever. Now, whether this was the proper thing to do, and whether the plaintiff was negligent in so doing, it was for the jury to say. Conceding that plaintiff was not negligent, and that the injury was not received because of inevitable accident, then it must follow that the negligence of the defendant caused the injury. True it is that reversing the lever is one of the ordinary hazards of the plaintiff's employment; yet, if the negligence of the defendant required such act to be done at that particular time, and the plaintiff was not guilty of negligence, but, on the contrary, acted prudently, with due regard for his own safety and the safety of others, then the defendant is liable, because the negligence of the defendant is the proximate cause of the injury.

We are unable to distinguish this from the *Squib Case*, which was decided years ago, and has been frequently referred to. In that case a squib was thrown from place to place, until finally a person was injured by it. The first person who so threw the squib was held liable for the injury. *Scott v. Shepherd*, 2 W. Bl., 892. Each person subsequent to the first threw the squib to protect himself and his property from injury. So, here, the plaintiff reversed the lever to protect himself and the property under his charge from consequences which would probably follow the negligent act of the defendant. See, also, *Palmer v. Andover*, 2 Cush., 600; *Allen v. Hancock*, 16 Vt., 230; *Woodward v. Aborn*, 35 Me., 271. It may possibly be true, as suggested by counsel for the defendant, that, if the plaintiff had been injured as he was while reversing the lever for the purpose of stopping the train to prevent it from running over cattle on the track, the defendant would not be liable, although the cattle got on the track because it was not fenced. It is sometimes exceedingly difficult to determine to which class a case belongs. But there is, and must of necessity be, a dividing line. It may, apparently, in some cases, have the appearance of being arbi-

 Shirland et al. v. The Union National Bank of Massilon, Ohio.

trary. This cannot be avoided. But we think the failure to fence would be more remote from the immediate cause of the accident than in the case at bar. Besides this, to reverse the lever for such a cause might well be regarded as one of the ordinary hazards.

REVERSED.

 SHIRLAND ET AL V. THE UNION NAT. BANK OF MASSILON, OHIO.

1. **Estoppel: JUDGMENT BY DEFAULT: HOW FAR CONCLUSIVE.** A judgment rendered against the defendants in a cause, upon their default, is conclusive upon them as to those rights only which were assailed by the petition, and which they were thus called upon to defend.
2. **Homestead: ABANDONMENT: FACTS NOT CONSTITUTING.** The evidence in this case considered, (see opinion,) and *held* not sufficient to establish the abandonment by plaintiffs of their homestead.

Appeal from Franklin Circuit Court.

FRIDAY, OCTOBER 24.

ACTION in equity to enjoin the sale on execution of a certain forty acre tract of land, on the the ground that the property is exempt as the homestead of plaintiffs. The judgment of the circuit court was for plaintiffs, and defendant appeals.

McKenzie & Hemingway, for appellant.

William Hoy and Taylor & Evans, for appellees.

REED, J.—The petition alleges that the plaintiff, Martha A. Shirland, became the owner, in 1878, of a farm of one hundred and sixty acres, and that the forty acres in question was occupied by her and her family as a homestead in the spring of 1879, and has been so occupied ever since, and that it was so occupied when the debt on which defendant's judg-

Shirland et al. v. The Union National Bank of Massillon, Ohio.

ment was rendered was contracted. It also alleges that, before defendant's judgment was rendered, she mortgaged said farm to one Wesley Mott, and that Vroman & Sale obtained a judgment against her, which was a lien on the whole of the premises, and which was assigned to said Wesley Mott, and that defendant, after it obtained its judgment, instituted a suit in equity against said Mott and plaintiffs, alleging that said mortgage was without consideration, and was given for the purpose of defrauding the creditors of plaintiffs, and that said judgment was in fact paid off and discharged by plaintiffs, but that they procured it to be assigned to Mott for the same fraudulent purpose, and praying that said mortgage and judgment be adjudged to be fraudulent and void, and to constitute no lien or incumbrance on said premises. It is also alleged that plaintiffs made no defense to said action, and that a judgment was entered therein, finding that the allegations in the petition, with reference to said mortgage and judgment, were true, and adjudging that the same were fraudulent and void, and constitute no lien on said premises, and ordering that the whole of the premises be subjected to the payment of defendant's judgment, free and clear of all claim or lien of said Wesley Mott, and that defendant now claims that the effect of this judgment is to subject the whole of said farm to sale in satisfaction of said judgment, without regard to plaintiffs' homestead right, and has caused execution to be levied on the same, and will sell the whole of it, unless prevented.

Defendant admits that plaintiffs occupied the portion of the premises in controversy as a homestead at the time the debt was contracted on which its judgment was obtained, but denies that she has continued to occupy the same since that time, and denies that it is now exempt as a homestead. It alleges that the judgment in the action against Mott and plaintiffs is an adjudication of the rights of the parties with reference to the claim now made. It also alleges that there are valid liens on that portion of the farm not claimed by plaintiffs as their homestead, which are superior to the lien of its judg-

ment, and are sufficient in amount to consume the same, so that the portion claimed as a homestead is the only portion of the farm from which it will be able to realize anything on its judgment; and that it expended a large amount of money in the action for removing the apparent lien of the Mott mortgage and judgment; and that, as plaintiffs were parties to that suit, and had an opportunity to assert therein their right of homestead, and neglected to assert it, they are now estopped to claim that the property is exempt as a homestead. The evidence shows that plaintiffs have not lived on the premises continuously since defendant's judgment was rendered. The questions presented by the record, then, are--*First*, whether the judgment in the former action is an adjudication of plaintiffs' right of homestead in the premises; *Second*, whether plaintiffs are estopped from claiming now that the premises are exempt as a homestead, by their failure to assert their homestead right in the former action; and, *Third*, whether they have forfeited their right of homestead by the abandonment of the premises.

I. In determining the effect of the former judgment, it is necessary to refer to the pleadings on which it is based, and consider the subject-matter of the controversy as shown by the pleadings, as well as the language of the judgment itself. The judgment was entered by default, and the only pleading in the case was the petition. It was alleged in the petition that the mortgage given to Wesley Mott was given without consideration, and was executed for the sole purpose of hindering, delaying and defrauding plaintiffs' creditors in the collection of their debts. It was also alleged that the judgment in favor of Vroman & Sale was in fact paid off by plaintiff, but was, by her request, assigned to Mott, without any consideration, and for the purpose of having said farm sold on execution issued thereon and bought in by Mott, and the title thereto held by him in trust for plaintiff. These were the only wrongs complained of in the petition, and the relief demanded was "that said mort-

1. ESTOPPEL:
judgment by
default : how
far conclu-
sive.

gage be set aside, canceled, and held for naught; also that the lien of said judgment to Vroman & Sale be declared subsequent to complainant's, and that the execution sale or other proceedings thereunder be declared fraudulent and void and of no effect as against complainant's judgment; that said northwest quarter of 17-91-21 be subjected to the payment of complainant's claim, free and clear of all claim of said Wesley Mott;" and the judgment is in substantially the language of this prayer.

We think it very clear that this judgment is not an adjudication of plaintiffs' homestead right in the premises. The judgment of a court of competent jurisdiction is conclusive on the parties as to all points directly involved in it and necessarily determined, but is conclusive as to none others. *Haight v. City of Keokuk*, 4 Iowa, 199; *Delany v. Reade*, Id., 292. The homestead right of plaintiffs in the premises was in no manner questioned in the proceedings. No complaint is made in the petition with reference to the subject of that right, and no relief is asked as against it. The only complaint related to the fraudulent mortgage and the judgment, which had in fact been satisfied, and the only relief demanded was that the premises be subjected to defendant's judgment, free and clear of all claim in Mott's favor under said mortgage and judgment; and the judgment does not undertake to give any relief except as against the mortgage and judgment complained of. We think it clear that the only questions concluded by it are those which relate to said mortgage and judgment.

II. We think it clear, also, that plaintiffs are not estopped from asserting that the premises are exempt as their homestead, by reason of their failure to plead that right in the former case. As we have seen, their right in that respect was in no manner questioned in that proceeding, and no relief was demanded with reference to it. They were, therefore, not called upon to assert it. It was not attacked, and they were not called upon to defend it; and we do not see

Shirland et al. v. The Union National Bank of Massillon, Ohio.

that the case comes within any principle of the law of estoppel.

III. The evidence shows that plaintiffs moved into the place in March, 1879, and that they cultivated it that year.

2. HOME-STEAD: abandonment: facts not constituting. Plaintiff, S. G. Shirland, is a millwright by trade, and about the first of June, 1880, he left home for the purpose of working at said business. He went to Le Grand, in Marshall county, and was employed there for one year. The other plaintiff remained on the farm with their only child (a son) until the next February, when she also went to Le Grand for the purpose of boarding the son while he should attend school at that place. She rented the farm to a party who occupied the dwelling-house, in which, however, she retained the use of two rooms, where she kept the greater part of her household goods. The family lived together and kept house at Le Grand until about July, 1881, when the husband went to Marshalltown, where he worked at his trade for nine months, when he returned to Le Grand. The wife and son remained there during his absence. On his return, he found employment at his trade, and, as we understand the evidence, the family continued to reside there until this suit was instituted. During all the time of their absence, they retained the use of a portion of the dwelling-house on the farm, and kept there the greater part of their furniture and household effects. We think the evidence shows that there was no intention to abandon the homestead finally, and that their absence from it was but temporary. The husband was away pursuing his ordinary business, and the wife, that she might board and be with the son while he was attending school, and the intention of both was to return to it when the purpose for which they went away was accomplished. Under these circumstance, it is very clear that they did not forfeit their homestead right. See *Fyffe v. Beers*, 18 Iowa, 4.

The judgment of the circuit court is

AFFIRMED.

DEERE & Co. v. NEEDLES, DEFENDANT, AND FISHER, INTER-
VENOR.

65	101
93	483
65	101
107	246
65	101
119	644

1. **Appeal to Supreme Court: SUFFICIENCY OF ABSTRACT.** An abstract which recites that it is an abstract of all the evidence, and that, within the time fixed by the court, the appellant filed his bill of exceptions, "embracing all the foregoing testimony and record," is sufficient, without stating that the bill of exceptions was properly authenticated when it was filed; for that will be presumed.
2. **Exceptions to Instructions: HOW AND WHEN MADE.** Exceptions to instructions, made by appellant in a motion for a new trial on the same day when the verdict was returned, setting forth the grounds of his exceptions, were made in time, and were sufficient, under Code, § 2789.
3. **Fraud: IN TRANSFER OF CHATTELS: EVIDENCE.** Fraud may be established by circumstantial evidence. Accordingly, the fact that F. bought a horse, harness and buggy of N., who was largely indebted, when he (F.) had no use for the property, and the fact that he soon returned the property to N. to be used as his own, were proper to be submitted to the jury upon the question of the good faith of the transaction between them.
4. **Sale of Chattels: POSSESSION: LOAN TO SELLER: NOTICE: CODE, § 1923.** A sale of personal property, accompanied with delivery and possession, may be valid, without the general public's having any knowledge upon the subject, and without the sale's being evidenced by any written, acknowledged and recorded instrument. (Code, § 1923.) All that the statute requires is that there shall be such a change of possession as shall give to parties dealing with the seller or buyer notice of the transaction. Accordingly, where one in good faith purchases chattels and takes possession thereof, he may afterwards loan or hire them to the seller without making them subject to attachment for the seller's debts.

Appeal from Cass Circuit Court.

FRIDAY, OCTOBER 24.

The plaintiffs commenced an action by attachment against the defendant, G. M. Needles, and attached a horse, buggy, and harness. E. G. Fisher intervened in the action, claiming that he was the absolute owner of the property, by purchase from the defendant, Needles. The plaintiffs, in their answer to the petition of intervention, claimed that the pre-

tended purchase of the property by Fisher was without consideration, and made with the intent to hinder, delay, and defraud the creditors of Needles. They also claimed that said Needles retained possession of the property, and that there was no record of any bill of sale thereof. There was a trial by jury, and a verdict and judgment for the plaintiffs, and Fisher, the intervenor, appeals.

Chapman & Chapman and *L. L. De Lano*, for appellant.

Smith, Carson & Harl and *A. S. Churchill*, for appellees.

ROTHOCK, CH. J.—I. Some question is made by counsel for appellees as to the sufficiency of appellant's abstract. It is claimed that it does not show that the bill of exceptions was certified by the judge, and made part of the record, and that the abstract does not purport to set out the bill of exceptions. The abstract recites that it is an abstract of all the evidence, and that, within the time fixed by the court, the intervenor filed his bill of exceptions, "embracing all the foregoing testimony and record." This is sufficient. It will be presumed that the bill of exceptions was properly authenticated when it was filed.

II. Error is assigned upon the giving of the second and third instructions to the jury. No exceptions were taken to the instructions when given. But, on the same day on which the verdict was returned, the intervenor, in a motion for a new trial, excepted to said instructions, and set out the grounds of his exceptions. This is sufficient. Code, § 2789.

III. The testimony of the intervenor is to the effect that he bought the horse and buggy and harness of Needles on the fifteenth day of August, 1882, and paid him \$450 in cash therefor; that he took possession of the property and put it in his stable near the city of Atlantic; that the property remained in his possession about two days, when Needles

wanted to use the property, and proposed that he would pay for its keeping in town, and give Fisher the privilege of using it; that he let Needles have the horse, harness, and buggy on this agreement; that Needles took the property to a feed stable in Atlantic, and Fisher used it frequently; that Needles was to keep them until about November first in the same year; that the day the property was attached Needles brought the horse to Fisher's place, saying he did not want him any longer; that he came on horseback about 11 o'clock; and that Fisher took the horse and rode him back to Atlantic, and put him in the same stable where Needles had been having him kept, and Fisher went to a station on the railroad near Atlantic, and, upon returning on the evening of the same day, he found that the property had been attached by the sheriff. This was on the sixteenth of October, 1882. It appears from other evidence in the case that the horse and other property were kept at the same feed-stable or livery-barn from the thirtieth of July up to the time of the attachment, with the exception of occasional absences of from one to three days. It is claimed in the motion for a new trial that the court erred in "giving the second instruction to the jury, it being misleading, there being no evidence before the jury that Fisher, at the time of the alleged sale, knew of the insolvency of Needles, nor was there any evidence that he did not purchase the property in good faith, and for an adequate and valuable consideration."

We think there was evidence in the case sufficient to warrant that part of the instructions complained of. It is true,

3. FRAUD : in
transfer of
chattels :
evidence. there is no direct evidence contradicting the testimony of Fisher to the effect that he bought the property in good faith, and paid for it in cash.

But direct evidence was not necessary. Fraud may be established by circumstantial evidence. It appears that Fisher and Needles were friends, and that they were together often, and were in the habit of riding around together. Needles was largely indebted. The fact that Fisher bought a horse,

harness, and buggy of Needles, when he (Fisher) had no use for the property, and the fact that he soon returned the property to Needles to be used as his own, were circumstances proper to be submitted to the jury upon the question of the good faith of the transaction between them.

IV. That part of the third instruction which is complained of is as follows: "It is claimed by Fisher that, when he bought the property on the fifteenth of August, it was delivered to him and kept by him in his possession, one, two, or three days, after which time he loaned it back to Needles for a time. If

4. SALE OF
chattels:
possession:
loan to sel-
ler: notice:
code, § 1923.

the property at the time of the alleged sale was delivered by Needles to Fisher, and left with Fisher at his place, and Fisher retained the full, complete, and actual possession thereof for such length of time as that the public generally became apprised of Fisher's purchase, and if his said possession became generally known in the community, this would be such a delivery of possession as would protect Fisher's title; and, if this is true, the fact that at some time afterwards he loaned the property to Needles for a short time, and for a temporary purpose, would not make the property liable to attachment at the suit of Needles' creditors. But if Fisher's possession under his alleged purchase was for so short a time, and under such circumstances as that the community generally would not probably become apprised thereof of the change of ownership, and if the property was allowed to go back into Needles' possession, and remain there any considerable length of time, with apparently the same appearance of ownership in Needles as had existed before the alleged sale, and if it still remained so in Needles' possession up to the time the attachment was laid upon it, then the plaintiffs, as attaching creditors, will hold the property under the attachment."

Section 1923 of the Code provides that sales of personal property, where the vendor retains actual possession thereof, are void as to existing creditors or subsequent purchasers

without notice, unless evidenced by a written, acknowledged, and recorded instrument. The question to be determined in this case is, did Needles retain the possession? [It cannot be claimed that where one in good faith purchases property and takes possession thereof, he may not afterwards loan it or hire it to the seller. The objection to the instruction is that the jury are therein directed that, in order to find the sale a valid one, it must be found that Fisher retained the full and complete actual possession of the property for such length of time as that the public became generally apprised of Fisher's purchase, and that his possession became generally known in the community. This, we think, was erroneous. A sale of personal property, accompanied by delivery and possession, may be valid, without the public having any knowledge upon the subject. Such a rule is not susceptible of proof as a fact, and, indeed, the public never generally become advised of so trivial a transaction as the sale of a horse, buggy, and harness. The purpose of the statute is that there shall be such a change of possession as will give to parties dealing with the seller or buyer notice of the transaction. It is such transfer of dominion over the property as to impart notice to persons dealing with reference to the property that the title has been transferred, or such possession as will put such persons in possession of such facts as will lead to inquiry as to the ownership. It is sometimes said that the possession must be such as to be notice to the world. This does not mean notice to the public generally, but to those who propose to purchase the property or deal with reference to it.] For the error in giving this instruction the judgment must be

REVERSED.

BUNCE V. BUNCE ET AL.

1. Guardian and Ward: ACTION ON BOND: PROCEEDS OF REAL ESTATE.

The sureties in an ordinary guardian's bond, required by section 2246 of the Code, are not liable for the wrongs of the guardian in selling his ward's real estate and in squandering the proceeds thereof. Section 2261 of the Code provides a special bond to secure the ward against such wrongs. *Madison Co. v. Johnston*, 51 Iowa, 152, followed, and *Bunce v. Bunce*, 59 Iowa, 533, explained.

Appeal from Cerro Gordo District Court.

FRIDAY, OCTOBER 24.

THIS is an action upon a guardian's bond. There was a demurrer to the petition, which was sustained, and plaintiff appeals. The facts appear in the opinion.

Blythe & Markley and *Brown & Carney*, for appellant.

Richard Wilber, for appellees.

ROTHROCK, CH. J.—It is averred in the petition, in substance, that George L. Bunce was appointed guardian of defendant on the fifth day of January, 1871, and that on the same day he filed a guardian's bond in the penal sum of \$3,000, with the defendants, James G. Beebe and George Vermilya, as sureties, and that he immediately made application to sell certain real estate, the property of plaintiff, and that an order of sale was made in pursuance of said application; that said real estate was sold by said guardian for the sum of \$1,675, and that the same was conveyed to the purchasers by said guardian, and the sales were approved and confirmed by the court; that said guardian is plaintiff's father, and that the application to sell the real estate of the plaintiff was wrongful, and that false grounds were alleged therein in order to procure the order of sale; that said sale was not necessary to pay the charges and expenses of education of the plaintiff; that plaintiff's father was then abundantly able to

support plaintiff and educate him; that said guardian wrongfully neglected to file any sale-bond before said sale was made, and procured said order of sale in bad faith, and that he sold more of said real estate than was necessary for any wants of the plaintiff, and that he wrongfully failed to comply with the direct order of the court, requiring him to loan the proceeds of the sale, but wholly disregarded said order, and converted the money received for said real estate to his own use; that on the nineteenth day of January, 1883, the court ordered said guardian to forthwith pay over all of said money in his hands, and that he refuses to make such payment, pleading his inability to do so; that said guardian has wasted and squandered the entire proceeds of the sale of said real estate; and judgment is demanded upon said bond for the sum of \$3,000, the amount of the penalty thereof.

A copy of the bond is exhibited with the petition, and the condition of the bond is as follows: "The condition of the above obligation is such that if the above-named George L. Bunce, who has been appointed guardian of the said Simon G. Bunce, shall faithfully discharge his trust as such guardian according to law, and shall render a fair and just account of said guardianship from time to time, whenever thereunto required by law, and render and pay to said minor all moneys, goods, chattels, title-papers, and effects which may come to the hands or possession of such guardian belonging to such minor, when he shall be entitled thereto, or any subsequent guardian, should such court so direct, then this obligation to be void, or otherwise to remain in full force and virtue." The demurrer was upon the following grounds: "(1) The petition on its face shows that the action is brought to recover the proceeds of land sold by said guardian, and for failure to pay over the same, and defendant is not liable therefor on the bond in suit, and that the same was not given to secure the proceeds of land sold or the payment thereof. (2) Said defendant demurs to that part of plaintiff's petition claiming for the proceeds of land sold by said guardian, for

the defendant is not legally liable therefor on the bond set out in the petition. (3) Defendant demurs to that part of the petition which alleges that the guardian wrongfully procured the order of court for the sale of the said land, and that said sale was not necessary, nor for the interest of the plaintiff, for the reason that it appears from the petition that the said matters were adjudicated by the circuit court when said order of sale was granted, and plaintiff is estopped from a new trial of said matters."

This demurrer was filed by the defendant, George Vermilya, one of the sureties in the guardian's bond, and it will be remembered that in determining the case we are dealing with the rights of the plaintiff as against the surety in the bond. It is charged in the petition that the guardian wrongfully neglected to file any sale-bond before said sale. This leads us to inquire whether the surety in the bond which was given is liable for the proceeds of the sales of real estate. In the case of *Madison Co. v. Johnston*, 51 Iowa, 152, it was sought to recover from a surety on a guardian's bond the proceeds of the sale of certain real estate. The conditions of the bond in that case were in nearly the same words as the condition of the bond in the case at bar. It was held that the surety was not liable, because, when the bond was given, it was not contemplated that the guardian would become the custodian of money arising from the sale of real estate, and because the law requires a special bond for the faithful performance of the duty of guardians in respect to the sale of the real estate of the ward. This bond was required by section 2556 of the Revision of 1860, and section 2261 of the Code contains the same requirement. That case is decisive of this. It is true that in the case cited a sale-bond was given, but that fact in no manner affects the principle involved in the case. It is said in the opinion that "it is reasonable to suppose that the bond holds the surety responsible for the failure of the guardian to perform duties contemplated when the instrument was executed. The failure to

discharge duties not contemplated by the law and by the parties cannot be the ground of recovery against the surety." It would be a most harsh and unjust rule to require the surety in the bond required in section 2246 to answer for the wrongs of the guardian in squandering the proceeds of the sale of the real estate, when by section 2261 provision is made for a special bond for the purpose of securing the ward in that respect. The surety in the first bond cannot be held to have contemplated any such liability, and, under the law, we think he makes no such contract and enters into no such undertaking. The general bond is given with reference to the personal property, and the sale-bond with reference to the proceeds of the sale of real estate.

The allegations of the petition to the effect that the order of sale was wrongfully obtained, and that the proceeds of the sale were wrongfully and fraudulently converted, would, no doubt, be proper as against the sureties in a sale-bond, but they cannot affect the liability of sureties on the general bond, because such derelictions of duty are not within their undertaking. Some claim is made by counsel to the effect that a right of action was recognized by this court in favor of plaintiff in the case of *Bunce v. Bunce*, 59 Iowa, 533. That was a controversy about the same subject-matter. That was an action to set aside the guardian's deed because there was no sufficient service of notice on plaintiff, and because the petition for the sale was insufficient, and because no sale-bond was given, and because there was no approval of the deed. In that case, in the course of the discussion, showing the distinction between a probate order and a judgment, it is said that if, in procuring the order of sale, the guardian "is guilty of bad faith or negligence, and thereby involves his ward in loss, he and his bondsmen are liable therefor." Of course, the bondsmen referred to are those who are legally liable for the proceeds of the sale of real estate. We need not pursue this branch of the case further. It is enough to say, in conclusion, that we did not intend in that case to

question the soundness of the opinion in the case of *Madison Co. v. Johnston*, *supra*. We think the demurrer to the petition was properly sustained.

AFFIRMED.

65	110
78	455
65	110
100	490

BABCOCK V. THE TOWNSHIP BOARD OF EQUALIZATION FOR CASS TOWNSHIP, CLAYTON COUNTY.

- 1. Appeal to Supreme Court: AMOUNT INVOLVED: JURISDICTION THE RULE.** In order to deprive this court of the jurisdiction of an appeal, on the ground that the amount involved does not exceed \$100, that fact must affirmatively appear from the pleadings. Code, § 3163.
- 2. Form of Action: WAIVER OF ERROR BY DEFENDANT.** Where plaintiff should have sought his remedy by an appeal from the action of the board of equalization, but, instead thereof, he prosecuted his case as an original action, and defendant answered thereto as such, and made no objection to the form of the proceedings, and was defeated in the court below, *held* that it could not for the first time in this court be heard to object to the form of the proceedings.
- 3. Taxation: MONEYS AND CREDITS: WHERE TAXED: CHANGE OF OWNER'S RESIDENCE: EVIDENCE TO ESTABLISH.** Moneys and credits are taxable only in the county of the owner's residence. For evidence which is held sufficient to establish the change of plaintiff's residence from the county in which he was taxed, see opinion.

Appeal from Clayton Circuit Court.

FRIDAY, OCTOBER 24.

THE township assessor of Cass township, in Clayton county, assessed plaintiff for taxation for the year 1883 on \$10,000 of moneys and credits. Plaintiff thereupon filed his petition with the township board of equalization, asking that said assessment be stricken from the assessment list, on the ground that he was not a resident of Clayton county, and that he was not liable to taxation on said property in that county. The board of equalization refused to grant him the relief prayed, and he thereupon instituted this

suit in the circuit court, praying for the same relief on the same grounds. The action was brought and tried as an equitable action, and the circuit court rendered judgment for plaintiff as prayed, and defendants appeal.

J. Larkin, for appellants.

B. W. Newberry and *J. O. Crosby*, for appellee.

REED, J.—I. Plaintiff filed a motion in this court to dismiss the appeal, on the ground that there is no certificate of the trial judge that the case involves a question of law on which it is desirable to have the opinion of this court. As shown in the statement of the case, the assessment of which plaintiff complains was for \$10,000. The question in controversy between the parties, however, is whether plaintiff is liable to be taxed in Clayton county on the property on which the assessment was made. The sum involved in the litigation, then, is the amount which would be levied as taxes on the assessment. But this amount is nowhere stated in the pleadings, nor are there any data given from which it can be determined. It does not appear, then, whether the amount involved exceeds \$100 or not. Section 3163 of the Code provides that the supreme court shall have appellate jurisdiction over all judgments and decisions of all other courts of record. But it is provided by section 3173 that “no appeal shall be taken in any cause in which the amount in controversy between the parties, as shown by the pleadings, does not exceed \$100, unless the trial judge shall certify that such cause involves the determination of a question of law upon which it is desirable to have the opinion of the supreme court.” In determining the extent or limitation of the right of appeal to the supreme court, the two sections must be considered together. The first section is declaratory of the general rule on the subject; the other establishes an exception to that rule. The general rule is that the court

1. APPEAL to
supreme
court:
amount in-
volved: juris-
diction the
rule.

"has appellate jurisdiction over all judgments and decisions of all other courts of record;" but by the exception cases are excluded from the operation of the rule when "the amount in controversy between the parties, as shown by the pleadings, does not exceed \$100;" and in that class of cases the court has jurisdiction only when the trial judge shall give the prescribed certificate. The court has jurisdiction, then, in every case which does not fall within the exception; and, to defeat the jurisdiction, the fact which brings the case within the exception must affirmatively appear from the pleadings. It is not shown by the pleadings in this case that it is within the exception. The motion to dismiss the appeal is therefore overruled.

II. This action was brought and tried in the circuit court as an original action. It is alleged in the petition that plaintiff appealed from the order of the board of equalization refusing to strike the assessment complained of from the list; and his petition to the board was introduced in evidence on the trial, but no consideration appears to have been given to the appeal. Appellants now insist that, as an appeal from the order of the board is allowed by statute, plaintiff should have been limited to this remedy, and that his original action should have been dismissed. But, whatever the real merits of the question here urged may be, we think it very clear that defendants have waived it. They appeared in the circuit court in obedience to an original notice, and answered plaintiff's petition, and the case was tried on its merits as an original action, without any objection on their part as to the character of the proceedings, and they cannot in this court for the first time be heard to say that the trial should have been upon the appeal, and not on the original proceedings.

III. Plaintiff was taxable on his moneys and credits in the county of his residence, and at no other place. *Barber v.*

2. FORM of action: waiver of error by defendant.

Babcock v. The Township Board of Equalization.

3. TAXATION:
moneys and
credits:
where taxed:
change of
owner's resi-
dence: evi-
dence to es-
tablish.

Farr, 54 Iowa, 57. In 1880, and prior to that, he was, without any question, a resident of Clayton county, and of the township in which the assessment in question was made. In 1877 he owned a residence in the village of Strawberry Point, in Clayton county, in which he resided with his wife. She died in that year, but he continued to keep house until 1879, when he sold his residence, and went to live with his sister in the same village. He owned a farm in Fayette county, which was occupied by a tenant. He continued to live with his sister at Strawberry Point until the fall of 1880, when he removed a portion of his furniture and household effects, and stored them in a room in the house on his farm, but a portion of his goods he left at the residence of his sister. He also took his trunk and valise, containing his wearing apparel, from his sister's place, stating to his sister at the time that he was going to live with his brother, who owned and lived on a farm adjoining the one owned by him in Fayette county. He took his trunk and valise to his brother's house, telling him and his family at the time that he had come to make his home with them. He swears that when he left Strawberry Point on this occasion he fully intended to make his home in Fayette county. He continued to make his home at his brother's until the summer of 1882. He frequently returned in the meantime, however, to Strawberry Point, and on some of these occasions remained there for some time, stopping with his sister. He and his sister were the administrators of the estate of her deceased husband, and the evidence shows that his object in going to Strawberry Point on these occasions was to give attention to the business of settling this estate. In the summer of 1882 he left his brother's place, taking his trunk and clothing with him, and returned to his sister's house. He remained there for some time, when he went east on a visit, and in the fall he was married, and returned to Strawberry Point with his wife, and they continued during the winter to board with his sister.

Schlisman, Assignee, v. Webber et al.

He testified, however, that it was his intention during all this time to return to Fayette county and make his home there.

On this state of facts we think it clear that plaintiff ceased to be a resident of Clayton county in the fall of 1880. He left there at that time, intending to make his home at another place, and also intending not to return again to that county to reside. From that time up to the summer of 1882 he was an actual resident of Fayette county, and his intention was to make that his home. His domicile and residence during this time were certainly in the latter county. And we think it equally clear that he has not lost his residence there. His absence from that county was temporary, and it was his intention to return there and make that his home. We think, therefore, that the case was rightly determined by the circuit court, and the judgment is

AFFIRMED.

65	114
101	578

SCHLISMAN, ASSIGNEE, v. WEBBER ET AL.

65	114
134	54

1. **Practice in Supreme Court:** QUESTION NOT RAISED BELOW. Questions which appellant might have had determined in the court below, but which he failed there to present, cannot for the first time be raised in this court.
2. **Justice's Court:** JURISDICTION: MORE THAN \$100: CONSENT: RECORD: EVIDENCE. A judgment rendered by a justice of the peace for more than \$100 is valid, provided the parties, as a matter of fact, have consented to his jurisdiction in the case, notwithstanding he fails to make such consent a matter of record. Compare *Bridges v. Arnold*, 37 Iowa, 221.

Appeal from Carroll Circuit Court.

FRIDAY, OCTOBER 24.

THIS is an appeal from an order of the circuit court sus-

taining a motion to set aside a sale on execution of certain real estate. The facts of the case are stated in the opinion.

George W. Paine, for appellant.

Bowen & Cloud, for appellee.

REED, J.—A judgment was rendered by a justice of the peace in favor of D. Wayne & Co., and against F. Webber, N. Webber, and A. Schlisman, for \$148.60. The action in which said judgment was rendered was on a promissory note, executed by the defendants, F. Webber and N. Webber. Defendant, Schlisman, was liable as an indorser of said note. All the defendants were served with notice of the pendency of said suit. Schlisman appeared and defended against the claim, but the Webbers made default. It is not shown, by any record made by the justice, that there was any consent by the parties that he should take jurisdiction of the case. A transcript of the judgment was filed in the office of the clerk of the circuit court, and execution was issued thereon, and the property in question was sold on said execution. When the transcript was filed in the clerk's office, the property belonged to the defendant, F. Webber, but before the execution sale he sold and conveyed it to Frank Kullenberg, who had no actual notice of the existence of the judgment when he bought. The judgment, in the mean time, had been assigned by Wayne & Co. to Schlisman, and he was the purchaser at the sheriff's sale. After the execution sale, Kullenberg filed his motion to set said sale aside on the following grounds: "(1) That the applicant is an innocent purchaser of said property, and that he had no notice of the pretended claim which plaintiff alleges to have against said property, and, as against him, the judgment is no lien on the property; (2) That, although said judgment was filed in the judgment docket at the time he purchased the premises, yet it did not convey notice to him of the outstanding lien, for the reason that it does not show that the court which

Schlisman, Assignee, v. Webber et al.

rendered the judgment had jurisdiction of the subject-matter of the action on which it is based; (3) That all proceedings under the judgment are void, for the reason that the transcript of the docket of the justice of the peace does not show that said justice had jurisdiction to an amount in excess of one hundred dollars, or to the amount of the judgment." On the hearing of the motion, the affidavit of Schlisman was introduced in evidence, by which it was shown that the note sued on in the action in which the judgment was rendered contained a provision by which the makers consented that any justice of the peace might render judgment thereon, notwithstanding the amount exceeded \$100.

I. It is contended by appellee that the assignment of the judgment by Wayne & Co. to Schlisman, one of the parties against whom it is rendered, operates, necessarily, to extinguish it, and that, for this reason, the sale of the property on the execution issued after such assignment is void. We think, however, that this question is not raised by any assignment of the motion, and we are satisfied that it was neither presented in the argument of the motion in the circuit court, nor considered by the court in determining it. Appellee is therefore not entitled to have the question considered here.

II. The question which is raised by the motion, and which was passed upon by the circuit court, is whether the judgment and the subsequent proceedings thereunder, including the sale of the property, are void by reason of the failure of the record to show that the consent of the parties was given that the justice might take jurisdiction of the case; or, in other words, whether the failure of the justice to embody in his record a statement of the facts on which his jurisdiction depends, has the effect to render his judgment and the subsequent proceedings thereunder void.

The jurisdiction of justices of the peace is defined by section 3508 of the Code as follows: "Within the prescribed limit, it extends to all civil actions, except cases by equitable

proceedings, when the amount in controversy does not exceed one hundred dollars; and by consent of parties it may be extended to any amount not exceeding three hundred dollars." Whether a justice has jurisdiction in a case involving more than \$100 depends, then, on whether the parties have consented to the jurisdiction. It is the fact of consent which gives him jurisdiction, and, in our opinion, if this fact existed, his judgment would be valid, even though no record of the fact was made. Section 3515 prescribes the matters which the justice is required to embody in his record, and the fact of consent to the jurisdiction in cases in which it is essential to the validity of the proceedings is not included. As the statute has thus prescribed the record which the justice is required to make, it follows, we think, that a judgment, the record of which embodies the matters so required to be embraced in it, is at least *prima facie* valid. Under section 3669, the proceedings of courts of limited jurisdiction are presumed to be regular, except in regard to matters required to be made of record; and, as the consent of the parties to the jurisdiction is not required to be made a matter of record, the presumption is that such consent was communicated to the justice in some manner before he proceeded to take jurisdiction of the case. The view we take of the question is consistent with the holding in *Bridges v. Arnold*, 37 Iowa, 221, where it is held that the judgment of a justice of the peace is not rendered void by his failure to embody in the record the fact that a return of the notice had been made showing service in the defendant, although that is one of the facts which section 3515 requires to be stated in the record. It is said in that case that jurisdiction is given by the fact of service, and not by the entry of the return in the record. We think, therefore, that the circuit court erred in sustaining the motion to set aside the sheriff's sale, and the order is accordingly

REVERSED.

MEREDITH V. PHELPS ET AL.

1. **Tax Sale and Deed: TIME FOR REDEMPTION: NOTICE: POSSESSION.**

Where, at the end of three years after the sale of land for taxes, the land is both unoccupied and taxed to no one, the purchaser is entitled to a deed therefor, without giving any notice to the owner at the expiration of the time for redemption; (*Fuller v. Armstrong*, 53 Iowa, 683; *Tuttle v. Griffin*, 64 Id., 455;) and such deed will be good, though made pursuant to a notice published several years later, when the land was both occupied by and taxed to the owner.

Appeal from Cass District Court.

FRIDAY, OCTOBER 24.

THIS is an action to establish plaintiff's right to redeem certain real estate from a tax sale, and to set aside a tax deed thereof to defendant, Phelps, and to cancel the deeds conveying the same to the defendants, Reinig and Yitzer. The district court dismissed plaintiff's petition, and he appeals.

C. C. Cole and *J. F. Macomber*, for appellant.

John W. Scott and *L. L. De Lano*, for appellees.

REED, J.—The property in controversy is a lot in the town of Lewis. The evidence shows that plaintiff obtained a tax deed of said lot in 1875, and in 1880 he obtained a quitclaim from the former owner. The sale under which he obtained the tax title was for the taxes for years prior to 1872. He neglected, however, to pay the taxes for that year, and in December, 1873, it was offered for sale by the county treasurer for said tax, and defendant, Phelps, was the purchaser. In April, 1878, Phelps published a notice that the right of redemption from said sale would expire in ninety days from that date, and in November following the county treasurer executed a tax deed of the lot to him. On the twenty-eighth of October, 1879, he sold and conveyed an

undivided one-half of the lot to defendant, Yetzer, and on the fourth of January, 1880, he sold and conveyed the remainder thereof to defendant Reinig. Both of said conveyances were warranty deeds. The grounds on which plaintiff claims the right to redeem from the tax sale to Phelps are: *First*, that he was a resident of the county in which the property is situated in the year 1878, and that he took actual possession of the property as early as the month of March in that year, and that it was taxed to him for that year, and that he was not personally served with notice of the time when the right of redemption from said sale would expire, and that, therefore, his right of redemption has not terminated; and, *Second*, that before Phelps obtained the tax deed the parties entered into a contract whereby Phelps agreed to sell and assign to him (plaintiff) the certificate of purchase, but that, in violation of this agreement, and in fraud of his rights, he procured the tax deed to be executed to him by the treasurer. These allegations are all denied by the answer, and it is alleged that defendants, Yetzer and Reinig, are innocent purchasers of the property for value.

The evidence on which plaintiff's first claim is based tends to show that in March, 1878, or during the winter preceding that, a number of loads of wood belonging to him were, by his direction, piled upon the lot, and the tax-book of the county for 1878, which was introduced in evidence, shows that the lot was taxed to him for that year. It is also shown that he then was, and for many years prior to that had been, a resident of the county. A good deal of evidence was introduced by defendants, contradictory of plaintiff's claim that said wood was placed on the lot in question, but we do not find it necessary to determine this question of fact. Nor is it important, we think, to determine whether the piling of said wood on the lot would be such an act of possession as would entitle plaintiff, under the statute, to notice of the expiration of the period of redemption. The sale, under which the tax deed to Phelps was executed, took place in

December, 1873. The statutory period of redemption, if all the intermediate steps required by the statute were then taken, expired in December, 1876. It is not claimed that either plaintiff or any other person was in possession of the property during that year. Nor was it then taxed either to him or any other person. The property was then unoccupied, and was taxed as unknown. Phelps was therefore entitled to receive a tax deed at that time without serving either plaintiff or any other person with notice to redeem. *Fuller v. Armstrong*, 53 Iowa, 683; *Tuttle v. Griffin*, 64 Iowa, 455. Plaintiff's right of redemption terminated at that time, even though the deed was not executed until nearly two years later. *Pearson v. Robinson*, 44 Iowa, 413; *Scofield v. McDowell*, 47 Iowa, 129. He is, therefore, not entitled to redeem from the tax sale on the first ground alleged.

II. Plaintiff testified that the alleged contract with Phelps for the purchase of the tax certificate was made in 1878. He does not claim to have paid any portion of the consideration which he agreed to pay for the transfer, nor does he claim to have taken possession of the property under the contract. As Phelps' right to a deed of the property was fully matured at the time the contract is alleged by plaintiff to have been entered into, it is very doubtful whether the parol evidence offered to establish it is competent. We do not, however, determine that question; for, admitting the competency of the evidence offered, it is clearly insufficient to establish the alleged contract. But two witnesses gave testimony on the question, viz., plaintiff and defendant Phelps, and there is a direct conflict between them. Plaintiff is in no manner corroborated. The burden of proof is on him, and it cannot be claimed that he has established said contract by a preponderance of the evidence. We think, therefore, that the judgment of the district court is right, and it is

AFFIRMED.

REPORTS
OF
Cases in Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA,
AT
DES MOINES, DECEMBER TERM, A. D. 1884,

IN THE THIRTY-EIGHTH YEAR OF THE STATE.

PRESENT:

HON. JAMES H. ROTHROCK,	CHIEF JUSTICE,	
" JOSEPH M. BECK,		} JUDGES.
" AUSTIN ADAMS,		
" WILLIAM H. SEEVERS,		
" JOSEPH R. REED,		

MAXWELL V. HUNTER.

1. **Tax Sale and Deed: PAYMENT BEFORE SALE: FACTS NOT CONSTITUTING: APPLICATION OF PAYMENT: MISTAKE.** Where one, through his agent, paid the taxes on his land, assessed to another, and the agent, conceiving that he had paid on the wrong land, afterwards had the treasurer apply the payment to other land, and the tax receipts and books were changed accordingly, so as to show the taxes unpaid on the land to which the payment was first credited, and the facts were such that it must be presumed that the principal had knowledge of the change made by his agent, and acquiesced therein, *held* that there was no such payment of the taxes on his land as would defeat a sale thereof for those taxes, and a deed made pursuant thereto.

Maxwell v. Hunter.

2. **Tax Title: ACTION TO QUIET: STATUTE OF LIMITATIONS: EVIDENCE.** An action to quiet a tax title cannot be defeated by the patent owner on the ground that it was not brought within five years after the recording of the tax deed, without showing that he or his grantors were in actual possession at the end of the five years. (*Moingona Coal Co. v. Blair*, 51 Iowa, 447; *Goslee v. Tearney*, 52 Id., 455.)
3. **Pleading: DENIAL: REPETITION OF AVERMENT.** Where an averment in an answer is denied in a reply, and the same averment is repeated in an amendment, no further denial thereof is necessary.
4. **Practice in Supreme Court: VARIANCE DISREGARDED.** Where appellant's answer was in confession and avoidance of the tax deed on which plaintiff relied, appellant cannot, on appeal to this court, avoid the force of such confession, by pointing out in appellant's abstract an apparent variance between the allegation and the proof of the thing thus confessed.

Appeal from Audubon District Court.

TUESDAY, DECEMBER 2.

ACTION to quiet title to certain land in Audubon county. There was a decree for the plaintiff. The defendant appeals.

Andrews & Stoltz and *J. M. & R. W. Griggs*, for appellant.

H. W. Maxwell and *Wm. Phillips*, for appellee.

ADAMS, J.—I. The plaintiff claims under a tax deed. The defendant contends that the tax deed is void for the reason, as alleged, that the taxes for which the land was sold had been paid prior to the sale. The taxes in question are the taxes for 1868, 1869 and 1870. We think that the evidence shows that the taxes for the first two years were paid in November, 1869, and for the last year in February, 1871. The land was sold for these taxes in October, 1871. If this were all, it would seem to be clear that the sale would be void. But in 1871, and prior to the sale, certain changes were made in the tax books and tax receipts, so that, at the time of the sale, it did not appear from the books and receipts

1. TAX SALE
and deed:
payment be-
fore sale:
facts not con-
stituting ap-
plication of
payment:
mistake.

that the taxes were to be deemed paid. The person who was at that time owner of the land, and the tax-payer, was one Heidlinger, who, it appears, lived in Indiana, and paid his taxes through one Houston. The question presented is as to whether Heidlinger was a party to the change made in the tax books and receipts.

The history of this case, as nearly as we can ascertain, is substantially as follows: Heidlinger purchased the land in 1861. The recorder, in recording his deed, made a mistake, so that the record did not show Heidlinger to be the owner, and the land was assessed to another person. Heidlinger, however, guided either by the records which he had in his possession, or having otherwise in mind the correct description of his land, sent to Houston money for the payment of his taxes, giving such description and proper instructions. Houston properly applied the money. The taxes upon the proper land were marked paid, and proper receipts were issued. Later, to-wit, in 1871, Houston seems to have conceived the idea that he had made a mistake. He had applied Heidlinger's money in the payment of taxes upon land assessed and taxed to another person, and which, so far as the record of deeds showed, Heidlinger did not own. He accordingly took the tax receipts to the treasurer and had a change made therein, and a corresponding change in the tax records, the object being to transfer the payments to other lands. The changing of the records in this way, after they were once fairly made, and with the intention of giving them a different legal effect, is, in our opinion, subject to very grave objections; but, however objectionable, it appears to us that if Heidlinger was a party to the change he was bound by it, and his payments from that time were not applicable to the land in question. When we come to the question as to whether Heidlinger was a party to the change, we meet with some difficulty. He was not, we think, necessarily such because his agent, Houston, procured it. Houston's instructions were to pay on the land in question, and we can-

not find in such instructions authority to transfer the payments, once made, to other lands. We have to say, also, that we find no direct evidence of authority beyond such instructions. But, when we come to look into the circumstances shown, we cannot avoid the conviction that Heidlinger had knowledge of the change, and, at least, acquiesced in it. The receipts offered by the defendant in evidence show the change. Did Heidlinger have the receipts after the change? We think so. The defendant holds under him, and should, we think, in the absence of evidence to the contrary, be presumed to have derived the receipts mediately or immediately from him to whom they belonged. If he derived them from some other person, as from Houston, and under such circumstances as to preclude the supposition that Heidlinger had possession or knowledge of them after the change, he should have shown it. But upon this point evidence is entirely wanting.

The defendant's position is that the transfer was a mistake, and, in consequence of it, the land was sold by mistake, and that they are entitled to be relieved against it. But the mistake is of the same character as where a person, desiring to pay taxes on certain land of his, should, through his own negligence or misunderstanding as to what he owned, pay on the wrong land, and afterwards, the taxes on his own land remaining unpaid, his land should go to sale and deed. A court could not relieve the land-owner against such a mistake.

II. . The defendant insists, however, that the plaintiff's action is barred by the statute of limitations. The tax deed was recorded in 1875. The action was not brought until more than five years thereafter. The plea of the statute of limitations would have been available to the defendant if he, or those under whom he claims, had been in actual possession at the end of the five years; (*Barrett v. Love*, 48 Iowa, 103;) but the evidence does not show that they were. The case, then, falls within the rule of *Moingona Coal Co. v. Blair*, 51

2. TAX title :
action to
quiet : statute
of limita-
tions : evi-
dence.

Maxwell v. Hunter.

Iowa, 447, and *Goslee v. Tearney*, 52 Iowa, 455. The defendant insists that, even in the absence of evidence, he, or those under whom he claims, should be deemed to have been in possession when the five years expired, because he says that he so averred, and the allegations were not denied by a reply. Without holding that a reply was necessary, it is sufficient to say that a reply was filed, in which the possession was denied. It is true that afterwards the defendant filed an amendment, in which he averred the possession a second time; but it was not necessary to deny what had already been denied.

One point remains to be noticed. The copy of the tax deed, set out in the abstract as the tax deed introduced in evidence, does not correspond, as to the description of one of the forty-acre tracts, with the copy of the tax deed attached to the petition as an exhibit. The appellant, in his argument in reply to the appellee's argument, calls our attention to this fact; but he had already admitted in his answer the execution of a tax deed, as set out in the petition and shown by the exhibit, and had placed his defense upon the ground that it was void. We think that we must be governed by the pleadings.

The judgment of the district court must be

AFFIRMED.

3. PLEADING :
denial : repetition of averment.

4. PRACTICE
in supreme
court: variance disregarded.

WARNER V. JOHNSON & HAKEMAN.

1. **Conditional Sale of Chattel:** CODE, § 1922: "ACTUAL POSSESSION" OF VENDEE: WHAT IS NOT. So long as an article sold upon condition, and shipped to the vendee by rail, is in the hands of the railroad company, subject to the company's charges for freight, and to the vendor's right of stoppage *in transitu*, it cannot be said to be in the "actual possession of the vendee, as those words are used in § 1922 of the Code; and, in such case, a third person who buys the article from the vendee, and obtains possession of it from the railroad company, takes it subject to the condition on which it was first sold, even though the conditional sale was not made a matter of record, as provided in said section.

Appeal from O'Brien District Court.

TUESDAY, DECEMBER 2.

ACTION for the recovery of specific personal property. The judgment of the district court awards the property to defendants. Plaintiff appeals.

Barrett & Bullis, for appellant.

J. B. Dunn, for appellees.

REED, J.—The case was submitted in the district court on an agreed statement of facts. It is shown by this statement that plaintiff entered into a written contract with A. C. Satterly for the sale of a fire-proof safe to him. Satterly paid no part of the purchase price, but gave his promissory notes therefor. It was stipulated in the contract, and also in the notes, that the title to the safe should not pass from plaintiff until the purchase price was paid, but neither of the instruments was acknowledged or recorded. Plaintiff resided at Cincinnati, in the state of Ohio, and he shipped the safe from that point by rail, consigned to Satterly, at Sheldon, in this state, that being his place of residence. After the safe arrived at Sheldon, and while it lay at the depot in charge of the railroad company, Satterly sold it to Davidson & Wood-

ruff, who paid him the price agreed upon, and received from him an order for the delivery of the safe to them, on which they procured it from the railroad company. They afterwards sold and delivered it to Alexander Davidson, and he sold and delivered it to H. E. Thayer & Co. Defendants were members of that firm, and upon its dissolution succeeded to whatever right it had in said safe. Satterly has never paid any portion of said notes, and none of the subsequent purchasers had any actual notice of the condition of the sale from plaintiff to Satterly. The value of the safe is less than \$100, and the trial judge has certified that the case involves the following question of law, on which it is desirable to have the opinion of this court, viz: "Had Satterly such actual possession of the safe at the time of the sale to Davidson & Woodruff as to bring the case within the meaning of section 1922 of the Code? That is to say, which had the better claim to the safe, and the ownership thereof, plaintiff or defendants, under these facts?"

Before the enactment of section 1922, it was well settled in this state that, when personal property was sold on condition that the title should not pass until the price was paid, the vendee was not regarded as a purchaser until this condition was performed, and he could not convey any interest in the property as against the vendor, even to an innocent purchaser. See *Bailey v. Harris*, 8 Iowa, 331; *Baker v. Hall*, 15 Id., 277; *Knoulton v. Redenbaugh*, 40 Id., 114. It was doubtless to prevent the injustice that parties were sometimes enabled to practice under the rule established by these cases that the section was enacted. It is as follows: "No sale, contract, or lease, wherein the transfer of title or ownership of personal property is made to depend on any condition, shall be valid against any creditor or purchaser of the vendee or lessee in actual possession obtained in pursuance thereof without notice, unless the same be in writing, executed by the vendor or lessor, and acknowledged and recorded as chattel mortgages." It is very clear that this statute in no manner

changes, as between themselves, any of the rights of the immediate parties to a conditional transfer of property, which are created or reserved by their contract. But it is the rights and interests of the creditors of, or purchasers from, the vendee which were intended to be protected by it.

To bring a case within the rule of the statute and take it out of the former rule, two things must concur: (1) There must be a purchaser from or creditor of the vendee, who, at the time his interest in the property accrued, had neither actual nor constructive notice of the interest reserved in the vendor by the condition of the contract; and (2) the vendee, at the time such interest accrues, must be in the *actual* possession of the property under the contract. Was Satterly in the actual possession of the property within the meaning of the statute? This is the question presented by the case. We think it must be answered in the negative. The legislature enacted the section for the purpose of modifying an existing and well settled rule of law. The language made use of for this purpose is not at all ambiguous. Plain words are made use of, and their meaning is not obscured by the connection in which they are used, and that meaning must be presumed to have been intended which is expressed by the language when the words used are given their ordinary legal sense. The term "actual possession," when used in the law, has a well-defined and certain meaning. "Actual possession exists when the thing is in the immediate occupancy of the party." 2 Bouv. Law Dict., 349. It cannot be said that Satterly was in the actual possession of the property in this sense. The common carrier that undertook to transport the safe from Cincinnati to Sheldon was his agent, it is true, and, in some sense, the possession by the carrier was his possession. But this was not actual possession by him. He had no dominion over it, and no enjoyment of it during the time it was in the hands of the carrier. He did not even have the right to the physical possession and use of it during that time. The carrier had a lien upon it for his charges, which gave him a

Stevens v. Holmes.

right of possession superior to any right in Satterly, until it was discharged, and, so long as it remained in the hands of the carrier, it was subject to the vendor's right of stoppage *in transitu*. *Alsberg v. Latta*, 30 Iowa, 442; *McFetridge v. Piper*, 40 Id., 627; *Greve v. Dunham*, 60 Id., 108. The possession by the carrier was, therefore, not exclusively for Satterly's benefit, and, if it could be said in any case that property held by an agent for his principal was in the actual possession of the principal, this is certainly not true when the agent himself has a right of possession superior to that of the principal, and the property is also subject, while in his hands, to a superior right in a third party. We think, therefore, that the district court erred in awarding the possession of the safe to defendants, and the judgment is accordingly

REVERSED.

• STEVENS V. HOLMES.

1. Instructions: REPETITION NOT REQUIRED.
2. Evidence to Support Finding of Court.
3. Errors not Assigned not Considered.

Appeal from Harrison District Court.

TUESDAY, DECEMBER 2.

ACTION on an account for goods sold, and on a promissory note. The plaintiff caused an attachment to issue. The defendant pleaded that the attachment had been wrongfully and maliciously sued out, whereby he had been greatly damaged. Trial by jury, judgment for plaintiff, and defendant appeals.

William Magden and S. H. Cochran, for appellant.

Smith & Smith, for appellee.

SEEVERS, J.—It is said the court erred in refusing an
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instruction asked by the defendant. There was no error in this respect, because the court, in the charge, instructed the jury as asked by the defendant in the instruction refused. The jury found specially that the writ of attachment was not wrongfully sued out. It is said this finding is contrary to the evidence. We do not concur in this proposition. It is said the verdict is contrary to the instructions of the court, because the evidence shows that property exempt from execution was attached. But we are clearly of the opinion there was evidence upon which the verdict can be sustained. After verdict, the defendant filed a motion to discharge the property, because it was exempt from execution. This motion was supported by the affidavit of the defendant.

It is said the court erred in overruling the motion, and in ordering the property attached to be sold. But counsel have failed to state any sufficient reason why this should be done, after the jury had found that the property was not exempt. The plaintiff was a surety on a note for the defendant. The former purchased the note, and this note is one of the causes of action for which judgment was rendered. It is said that no recovery should have been permitted on the note, because the plaintiff, cannot maintain an action thereon, but only on the implied promise to reimburse the plaintiff, if he was compelled to pay the note. We do not feel called on to determine this question, because no such error has been assigned. The judgment of the district court must be

AFFIRMED.

ANDERSON ET AL. V. THE WABASH, ST. LOUIS & PACIFIC
RAILWAY COMPANY.65 131
80 90

1. **Railroads: LOSS OF BAGGAGE: JOINT OWNERSHIP: RECOVERY.** Plaintiffs were the joint owners of a chest, but owners in severalty of the articles therein contained. They shipped it as baggage on defendant's road, and a check was issued to them jointly therefor. The chest and contents were lost, and plaintiffs brought their joint action to recover therefor. *Held* that, by issuing the check to plaintiffs jointly, the company entered into a joint contract with them, and that it could not insist that the contract should be severed, and separate actions brought thereon, to correspond with the ownership of the property. See Code, § 2544.

Appeal from Wapello Circuit Court.

WEDNESDAY, DECEMBER 3.

THIS is an action at law by which the plaintiffs seek to recover of the defendant the value of certain baggage alleged to have been lost by the defendant in June, 1881. There was a trial by jury, and a verdict and judgment for the plaintiff for \$85. Defendant appeals.

Trimble, Carruthers & Trimble, for appellant.

John B. Ennis, for appellees.

ROTHROCK, CH. J.—I. It appears from the evidence that the plaintiffs are natives of Sweden; that they came from that country to the United States at the same time, and as traveling companions. Before leaving Sweden, they procured a large chest, made of boards, for their joint use, in which they placed their wearing apparel. They purchased through tickets from some point in Sweden to Ottumwa, Iowa, by way of Montreal, Detroit, and Toledo, Ohio. The chest was not checked through to the point of plaintiffs' destination, but it was rechecked at Detroit, and also at Toledo. It did not arrive at Ottumwa, but another piece of baggage

Anderson et al. v. The Wabash, St. Louis & Pacific R'y Co.

arrived there with a check upon it, corresponding with the check delivered to the plaintiffs at Toledo. Charles Anderson, one of the plaintiffs, testified to the contents of the chest, and to the value thereof. He described several articles of clothing as belonging to him, and several other articles as belonging to his co-plaintiff. He designated the plaintiff, A. Anderson, as his partner. No objection was made to this evidence, but the defendant asked the court to instruct the jury that the plaintiffs were not entitled to recover for any of the property not jointly owned by them, and that, as the evidence showed that some articles were owned by the plaintiffs in severalty, no recovery could be had therefor. The court refused to give this instruction, upon the ground that the objection came too late—the evidence of ownership having been admitted without objection, and no motion having been made to sever the causes of action.

This ruling of the court is, as it appears to us, the principal question in the case, and our examination of the record has led us to the conclusion that the court was correct in refusing to give the instruction. The plaintiffs were the joint owners of the chest, and the check was issued to them jointly, and a check for baggage answers the purpose of a bill of lading. It is the evidence of the contract between the carrier and the traveler for the transportation of his baggage, and this suit was brought on that contract. It is not disputed that a joint recovery may be had for the chest, because it appears that it was the joint property of the plaintiffs, and the check was issued to the plaintiffs jointly, not only for the safe carriage and delivery of the chest, but for the contents as well; and the fact that as between the plaintiffs the contents were in part owned by one, and in part by the other, cannot affect the joint contract made by the defendant. It entered into a joint contract, and it cannot be allowed to insist that the contract shall be severed, and separate actions brought thereon. If the theory of the defendant be correct, the plaintiffs must be required to institute three

actions; one by both of them for the loss of the chest, and one by each of them for the loss of his own clothing. The law requires no such multiplicity of actions upon such a contract as this. We think the objection of the defendant should have been overruled, if made at the time the evidence was introduced; and it will be remembered that we place our ruling upon the ground that the defendant contracted with both the plaintiffs jointly, for the benefit of each, that it would carry the chest and contents and deliver it to them at Ottumwa; and we think the rule we announce is within section 2544 of the Code.

II. It is insisted that the evidence does not show that the chest came into the possession of the defendant at Toledo. It appears that, when the plaintiffs arrived at Toledo, they exchanged the check they then had for another, and left the agents of the defendant to place the duplicate, or the check corresponding with that delivered to the plaintiffs, upon the chest. The baggage must have arrived at Toledo, because one of the plaintiffs assisted in loading it on the train at Detroit, where it was checked for Toledo. But it is useless to discuss the evidence upon this point. It is enough to say that there is no such failure of proof as to authorize us to interfere with the verdict.

There are other questions of minor importance, pertaining to the rulings of the court upon the admission and exclusion of evidence, which we do not deem it necessary to refer to in detail. None of them appear to be well taken, and the disposition which we make of the case renders it unnecessary to pass upon the motion of appellees to dismiss the appeal as to one of the plaintiffs.

AFFIRMED.

REED, J., *dissenting.*

Taylor v. Highberger.

TAYLOR V. HIGHBERGER.

SAME V. NAUMAN.

SAME V. STOERMER.

1. **DOWER: CUT OFF BY SALE IN BANKRUPTCY.** A sale by an assignee in bankruptcy of the bankrupt's land is a judicial sale thereof within the meaning of section 2440 of the Code, and bars a claim to dower therein by the widow of the bankrupt. Compare *Stidger v. Evans*, 64 Iowa, 91.

Appeal from Keokuk District Court.

WEDNESDAY, DECEMBER 3.

THESE actions involve the right of the plaintiff to dower in certain lands in Keokuk county. The district court held that the plaintiff had no interest in the lands, and she appeals.

Mackey, Fonda & Mackey, for appellant.

G. D. Woodin, for appellee.

ROTHROCK, CH. J.—All of the cases involve the same questions, and they are submitted on one abstract and argument, with an agreement that the decision of one shall be regarded as the final disposition of all of them. The cause was submitted to the court below upon an agreed statement of facts, from which it appears that the plaintiff was married to John M. Taylor in 1838, and continued to be his wife until his death, which occurred in 1881. After the marriage of said parties, they resided in the state of Pennsylvania, until the year 1875, when they removed to Keokuk county, in this state, where they resided until the death of Taylor. Taylor became the owner of the lands by purchase from the general government in 1854. In 1868 he mortgaged said land to one Lafever. The plaintiff did not join in the mortgage. In August, 1868, Taylor was adjudged a bankrupt upon voluntary proceedings, in the United States district

court for the Western district of Pennsylvania, and on the same day his property was assigned to one Dill, as assignee in bankruptcy. The assignment was afterwards filed for record in Keokuk county, in this state. On the thirtieth day of June, 1869, said United States court made an order to sell the real estate in question and other real estate, subject to said mortgage, and afterwards said assignee sold the land at public sale to Daniel F. Lafever, subject to said mortgage, for the sum of fifteen dollars, and executed to Lafever a deed for the same, which was filed for record in the recorder's office; and thereafter said sale was duly approved, and Taylor obtained a discharge from all his debts. The defendant is in possession of the land as a grantee under the title acquired by Lafever at the assignee's sale.

The rights of the widow in the land are to be determined by the laws of this state, without regard to the residence of her husband and herself at the time of the proceedings in bankruptcy. Under the law then and ever since in force in this state, the widow is entitled to "one-third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, which have not been sold on execution, or any other judicial sale, and to which the wife has made no relinquishment of her right."

The question to be determined in this case is, was the sale by the assignee in bankruptcy a judicial sale, and within the statute above quoted? In *Stidger v. Evans*, 64 Iowa, 91, we held that a sale under the insolvent laws of this state was a judicial sale, and that it was a bar to any claim for dower on the part of the widow of the insolvent debtor. In that case it was insisted that the sale was not made under the direction nor subject to the approval of any court, and that, because it was not thus made, it was not a judicial sale. In this case it appears that the sale was ordered by the court, and that after it was made it was approved. We think there is no difference in principle between the case at bar and the case above cited.

AFFIRMED.

Molony v. Dixon.

65	136
84	293
65	136
134	361
134	363

MOLONY V. DIXON.

1. **Party Wall: WHAT IS: RECOVERY FOR USE OF: MEASURE OF DAMAGES.** Where plaintiff purchased a lot of defendant, and agreed to erect a building thereon, and it was further agreed between them that when the defendant erected a building upon the adjoining lot he would construct, in connection with the plaintiff's building, a stairway to the second story, one-half of which should be on the ground of each party, and plaintiff, accordingly, built his wall 20 inches from the line, and defendant not only used the wall so built for the purpose of the stairway, but built into it in such a way as to support his own building, and in a way not demanded for the support of the stairway, then the wall became a party wall, and plaintiff was entitled to recover one-half the value thereof at the time defendant so used it, with interest at six per cent.
2. ———: **PROCEDURE: CHOICE OF REMEDIES.** In such case, the defendant, before building into the wall, should have paid plaintiff one-half the value thereof, and, in case of disagreement, should have had the value appraised, as provided in section 2020 of the Code; and, upon his failing so to do, the plaintiff might possibly have enjoined his building into it; but she was not obliged to do so, nor was it necessary for her to have the value of the wall appraised, in order to maintain an action for half its value.
3. ———: **PILASTER PART OF WALL.** In such case, a pilaster at the front of the party wall, and on which rested the lintel over the stairway, was a part of the wall to be paid for.
4. ———: **WHAT IS NOT.** In such case, the wall built by defendant over and in front of the stairway was a part of the front wall of his own building, and plaintiff was not liable for half the cost thereof.

Appeal from Wapello Circuit Court.

WEDNESDAY, DECEMBER 3.

ACTION to recover one-half of the cost of what the plaintiff claims to be a party wall. The defendant pleaded a counterclaim. Trial by jury, judgment for the plaintiff, and defendant appeals.

McNett & Tisdale, E. H. Stiles and J. W. Dixon, for appellant.

J. J. Smith and W. H. C. Jaques, for appellee.

SEEVERS, J.—I. In 1880 the plaintiff purchased of the defendant and J. G. Hutchinson a lot in the city of Ottumwa, upon which the plaintiff agreed to erect a two-story brick building; and it was further agreed between said parties that when the defendant constructed a building on the adjoining lot he would construct, in connection with the plaintiff's building, a stairway to the second story, of the usual width, and to be constructed in the usual manner, one-half of which should be on the ground of each party. The plaintiff erected her building, and placed a portion of her wall on her own ground, 20 inches from the line. The defendant afterwards constructed a building on the abutting lot. He also constructed a stairway, as he had agreed to do, and this action was brought by the plaintiff to recover for the cost of one-half of the wall which was 20 inches from the line, and entirely on her own land, on the theory that it was, in fact, a party wall. The court instructed the jury that, "under the contract of the parties, the defendant had the right to construct the stairway in question. In so doing, he might build into that part of the plaintiff's wall that stands on her own land, for the support of the common stairway, without making that part of the plaintiff's wall a party wall. If the defendant built into that part of the plaintiff's wall that stands entirely on her own land, only so far as it was necessary to support the common stairway, although it may incidentally afford some support to defendant's building, yet, in that event, defendant would not be liable to pay for one-half of said wall, but if the defendant built into that part of plaintiff's wall which stands entirely on her own land in such a way as to support his building, and in a way not demanded for the support of the stairway, then you should allow the plaintiff one-half of the value of that part of the wall at the time the defendant used it, with six per cent interest thereon." The defendant contends that this instruction is erroneous, and that a wall

1. PARTY wall:
what is: re-
covery for use
of: measure
of damages.

cannot be regarded as a party wall which is entirely on the property of one of the adjoining proprietors. In Washburn on Easements, *467, it is said that "the cases, both in the English and the American courts, have been so few, in which the rights of parties in respect to party walls have been considered, that I have been induced by the importance of the subject to depart from the general rule in reference to this work, and borrow somewhat freely from the French law, as throwing light upon some points not yet adjudicated by the common law-courts. But it should be remembered that by both the civil and the common law, if the subject becomes one answering to the character of a party wall, it must be made so by the agreement, actual or presumed, of the parties to that effect." Our statute on this subject, it has been said, was copied from the civil law of Louisiana. Note to *Bert-ram v. Curtis*, 31 Iowa, 46. Therefore, it is not surprising that counsel have been unable to cite any case in which the question under consideration has been adjudicated. The statute provides that, where a person is about to erect a building contiguous to the land of another, he may rest one-half of his wall on the land of his neighbor, and the latter has the right to make the wall a party wall by paying one-half of the expense of constructing the wall. Code, §§ 2019, 2020. But a person is not compelled to so construct his building. He may build it immediately on the line, but entirely on his own ground, and, without doubt, we think, the owner of the abutting property would have the right to make such wall a party wall, by connecting his building with the one constructed by his neighbor, by paying one-half of the expense of the wall, and one-half of the value of the land on which it is situate. The statute so provides. Code, § 2027.

The present case is materially different, the wall being not only entirely on the plaintiff's ground, but 20 inches from the line of the defendant's property. Can such a wall become a party wall? We think it may be so regarded under the

facts of this case, as contemplated in the instruction under consideration. The thought of the circuit court seems to have been that, as the plaintiff erected her building so that the defendant could construct a stairway, if he, in so doing, used the wall, not for stairway purposes, but as a party wall, then he should pay one-half of the expense of its construction. But for the stairway, the plaintiff would not have built her wall as she did. The stairway was for the accommodation of both parties. The plaintiff's wall answers the purpose, and is used by the defendant as a party wall. The jury, at least under the evidence, was authorized to so find. We think, if the wall was used as a party wall, and so regarded by the parties, then they should mutually contribute to the expense of its construction. An agreement should be implied from the acts and conduct of the parties. This seems to have been the thought of the court in *Zugenbuhler v. Gilliam*, 3 Iowa, 391. It is there said, in speaking of the conduct of the defendants in relation to a party wall: "They built into it, they use it, and, in so doing, they make it a party wall, and become liable to contribute to its cost." Counsel say that, if a wall 20 inches from the line may become a party wall, so may a wall which is five or ten feet distant. No such case can be anticipated, but, if the wall was so built for the purpose of constructing a stairway, as in this case, we are not prepared to say that such result would not logically follow. Stress must be laid on the fact that it was mutually agreed that the plaintiff would erect the wall as she did, and that it has been used as a party wall. Counsel further say that, when the defendant used the wall for any purpose other than for the stairway, he committed a trespass. This may be conceded, but the plaintiff may waive the trespass and sue on the implied agreement. It is further said that, as the defendant constructed a wall on his side of the stairway, it is not just to make him contribute one-half of the expense of the wall on plaintiff's side; but there is no pretense that the defendant's wall supports the plaintiff's building, nor

Molony v. Dixon.

that it in any sense is a party wall. We think the instruction is correct, and that the verdict is warranted by the evidence.

II. It is provided by the statute that, if a party refuses to contribute to the erection of a party wall, he shall have the
 2. ———: pro- “right of making it a wall in common by paying
 cedure: to the person who built it one-half of the appraised
 choice of remedies. value of the wall before using it.” Code, § 2020.

It is insisted that the plaintiff should have had the value of the wall ascertained by appraisers before she can maintain this action. In this proposition we do not concur. The plaintiff could have objected, and possibly by injunction have prevented the defendant from using her wall until he had paid her one-half of its cost. Before building into the plaintiff's wall the defendant should have offered to pay one-half of the expense thereof, and, if the parties were unable to agree, the defendant should have caused appraisers to ascertain the cost of the wall, and tendered one-half of such amount, and then he would have been authorized to attach his building thereto.

III. There was evidence tending to show that there was an iron pilaster in front of, but which formed a part of, the
 3. ———: pilaster part plaintiff's wall; and that a “lintel” in the defend-
 of wall. ant's building rested on the pilaster. The lintel, as we understand, supported the wall over the stairway. The plaintiff introduced evidence showing the value of the pilaster, which the defendant moved the court to strike out, on the ground that the evidence was immaterial. The motion, as we think, was rightly overruled, because the pilaster was just as much a part of the wall as the brick and mortar.

IV. The defendant sought to prove the value of the brick wall over and in front of the stairway. The court held that,
 4. ———: what as such wall was “level with the second story, it
 is not. is not a part of the stairway proper. It is a part of Dixon's building, and the plaintiff is not liable to pay for one-half of that.” The evidence was therefore rejected. We think the view of the court is correct, because the portion of

The State v. Woodworth.

the wall over the stairway is, as the court said, a part of the defendant's building. Having considered all the errors argued by counsel, the result is that the judgment of the circuit court must be

AFFIRMED.

THE STATE V. WOODWORTH.

1. Bastardy: EVIDENCE OF PATERNITY OF FORMER BASTARD CHILD.

In an action for bastardy, where the complainant has been guilty of illicit intercourse with a man other than the defendant, it is competent to show such fact as a circumstance to be used in corroboration of the defendant; and this fact may become very important, if it is shown who the other man was, and that his intimacies and opportunities continued until after the child in question was begotten. And so, where the complainant was the mother of another bastard child, born some fourteen months prior to the one in question, it was competent, under the facts of this case, (see opinion,) to ask her, when on the stand, who the father of the first child was.

2. Evidence: OF BAD MORAL CHARACTER TO IMPEACH WITNESS: REBUTTING. Where the state, for the purpose of impeaching one of defendant's witnesses, had introduced evidence of the general bad moral character of the witness, and the defendant, on cross-examination, had drawn out the fact that the bad reports against the witness were based upon certain suspicions, it was not competent for defendant to go further, and, by evidence in chief, show that such suspicions were without foundation.

3. ———: ———: ———. While it is true that evidence of particular immoral acts cannot be given for the purpose of impeaching a witness' general moral character, yet, where there has been evidence that the general reputation of a witness is bad, it cannot be said, as a matter of law, that such proof is insufficient to establish bad moral character, simply because, on cross-examination, it appears that his bad reputation is limited to some particular vice. It is the province of the jury, in such case, to determine the weight and effect to be given to the whole testimony relating to the witness' moral character.

Appeal from Cedar District Court.

WEDNESDAY, DECEMBER 3.

65	141
80	569
65	141
87	356
65	141
108	742
65	141
117	666
65	141
128	248

THE plaintiff was charged with being the father of a bastard child born to one Minnie Mansfield. There was a verdict against the defendant, and judgment was rendered thereon. He appeals.

A. J. Monroe and Sheean & McCarn, for appellant.

J. H. Preston and Herrick & Dowsee, for appellee.

ADAMS, J.—I. The child in question was born on the first day of June, 1883. The complainant, as appeared from her testimony, was the mother of another bastard child, born on the tenth day of April of the year previous. It also appeared from her testimony that the defendant had connection with her but once, and it was thereby rendered certain, if the witness was to be believed, that he was not the father of the first child. While she was upon the stand, and some testimony had been given by her in relation to the first child, counsel for the defendant asked her this question: "Who was the father of that child?" To this question the state objected, and the court sustained the objection, and the defendant assigns the exclusion of the question as error. The objection made below to the question, and now urged, is that it did not appear to be material. A charge like the one in question, which may be falsely made for various motives, is oftentimes with great difficulty disproved. The defendant, to be sure, is allowed to testify in his own behalf; but standing charged, as he does, with a heinous offense, his testimony is oftentimes discredited, and considered as outweighed by the testimony of the complainant alone. But, where the complainant has been guilty of illicit intercourse with a man other than the defendant, it is competent to show such fact as a circumstance to be used in corroboration of the defendant, and this circumstance may become very important, if it is shown who the other man was, and that his intimacies and opportunities continued until after the child in question was begotten.

In the case at bar, the evidence shows that at the time the child in question was begotten the complainant was living in the defendant's family, and was engaged to be married to a man who was also living in the family, and was one of the defendant's employes; and that he remained engaged to her, notwithstanding what transpired, and was engaged at the time of the trial. The name of this man was Gillian Vallier. Now, if, when the complainant was asked who was the father of the first child, born less than fourteen months prior to the birth of the second, she had answered that Gillian Vallier was, the proof thus afforded of his disposition, and of his conquest over the complainant's virtue, with the evidence of his continued engagement through the complainant's humiliating and disgraceful condition, would have gone far towards corroborating the defendant in the denial which he made in his testimony that the child in question was his. We may say, further, that, according to the testimony of one witness, the complainant stated that Vallier was the father of the child in question, but that Mr. Woodworth would have to pay for it all the same. If the testimony of this witness was to be believed, there can be scarcely a doubt that a verdict should have been rendered for the defendant. Proof that Vallier was the father of the first child would have tended to make credible the testimony of this witness, as well as corroborated the defendant in his denial.

It is true, when the question was asked as to who was the father of the first child, evidence had not then been introduced by the defendant tending to implicate Vallier as the father of the child in question; and, besides, it is not certain how the question would have been answered. But we can not say that it did not for that reason appear to be material. However it might have been answered, it might have led to an important inquiry. It was abundantly evident that the purpose of the question was to commence laying the foundation for the inference that the father of the first child, who it was proved was not the defendant, was the father of the

second. The first step towards a successful inquiry was to ascertain the name of the father of the first child. The fact sought was an obvious link in a chain of inquiry suggested by the very nature of the case itself. We do not think it can be said that the defendant was not pursuing the proper order of evidence. We cannot presume that the defendant knew how the complainant would answer the question. He should, we think, have been allowed to have the answer, and then govern himself accordingly. Besides, the defense proceeded upon the theory that the complainant had been guilty of perjury. Somewhat depended upon not disclosing to her the exact purpose of the inquiry, or future plan of evidence, if one had been formed. We think that the defendant was entitled to considerable freedom in this respect, and that the question should have been allowed.

II. After the defendant had testified in his own behalf, the state, in order to impair his credibility, introduced witnesses who testified that he was not a man of good moral character. On cross-examination, however, it was revealed that the talk against the defendant's moral character was based upon the fact that he had kept house, and had employed as a domestic, through many years, one Mollie Rynders, and had, a part of the time, no other woman in the house. The defendant introduced as a witness one Quinn, who testified that he lived in the defendant's family during the same time Mollie Rynders did. He was then asked this question: "State whether there was anything in the conduct of either Mr. Woodworth or her to excite suspicion, or give occasion for rumors of bad conduct between them?" The state objected to this question, and the objection was sustained. The defendant assigns the ruling as error.

In our opinion, the question was properly excluded. The state had not shown that there had been any bad conduct between the defendant and his domestic, nor could it have been allowed to do so. The Code provides that "the general moral character of a witness may be proved for the pur-

2. EVIDENCE:
of bad moral
character to
impeach wit-
ness: rebut-
ting.

pose of testing his credibility." Section 3649. Evidence of particular immoral acts is not admissible. The rule is stated in 1 Greenl. Ev. § 461, as follows: "In impeaching the credit of a witness, the examination must be confined to his general reputation, and not be permitted as to particular facts; for every man is supposed to be capable of supporting the one, but it is not likely that he should be prepared to answer to the other without notice." If such evidence had been admissible, and had been introduced on the part of the state, it would follow, of course, that the defendant should be allowed to disprove the alleged immoral acts. But such is not the case. The only suggestion of immoral conduct between the defendant and his domestic was drawn out by the defendant on cross-examination. His object was to limit and define the character of the bad reports against him, and break the force of the evidence. He showed by the cross-examination that bad reports against him arose from a circumstance which, at worst, was equivocal in its character, and not necessarily inconsistent with his innocence. Further than that we do not think that he was entitled to go. If he could have been allowed to show by cross-examination the foundation of the bad reports, and then, by evidence in chief, show that he was not guilty of what he had been suspected, the state should have come prepared to rebut the evidence in chief; and, under such a rule, any trial might take the form of an indefinite number of criminal accusations and defenses of witnesses. It was the defendant's right by cross-examination to limit and define the character of the bad reports against him, and by evidence in chief, showing his general moral character to be good, to directly rebut the state's evidence. This he did do, and with this, we think, he should have been content.

III. The state introduced as a witness one Michael Mansfield, the father of the complainant. The defendant introduced witnesses who testified that the general moral character of Mansfield was bad. The state,

presumably to break the force of this evidence, undertook by cross-examination to limit the bad reports against Mansfield to his character as a liar and a thief. The court in its charge (fifth division) instructed the jury, in substance, that, if the whole testimony of any witness called to testify to the general moral character of Mansfield disclosed that his testimony was based upon a particular vice, or reputation for a particular vice or immorality, it would not be sufficient to show a want of general moral character. The giving of this instruction is assigned as error. While it is true that evidence of particular immoral acts cannot be given for the purpose of impeaching a witness' general moral character, yet, where the moral character has been impeached in the usual way, by showing his general reputation to be bad, we do not think the party offering him can by cross-examination wholly destroy the impeaching evidence, by showing that the witness' bad reputation is limited to some particular vice. A person cannot be said to have a good moral character who has a reputation for any vice. The word "general," as used in the section of the statute cited, was designed, we think, to indicate the mode of proof, and not as implying that a person's general moral character is good, which is bad only in one respect. The moral character of a witness is to be shown in a general way, and that is by his general reputation. If the state succeeded upon cross-examination in showing that the bad reputation of Mansfield was confined to his character as a liar and a thief, it was doubtless entitled to whatever mitigation of the impeaching evidence there might be in such fact, but, we think, to nothing more. In no view do we think that the instruction can be sustained; but it may not be improper for us to say that, even if it were correct in principle, it would not seem to be justified by the evidence. We are unable to discover that any witness called to testify against the moral character of Mansfield disclosed that his testimony was based upon a particular vice.

REVERSED.

GARMOE V. STURGEON ET AL.

1. **Tax Sale and Deed: NOTICE TO REDEEM: WHEN NOT NECESSARY TO VALIDITY OF DEED: PRESUMPTION ARISING FROM DEED.** When land sold for taxes is unoccupied and taxed as unknown at the time when notice of the expiration of the time for redemption should be given, there is no person on whom the notice can be served, as required by statute, and, in such case, the treasurer is authorized to execute a deed to the tax purchaser without the service of such notice; (following cases cited in opinion;) and after such deed is made, it must, under the statute, be presumed, in the absence of a contrary showing, that the facts were such that no such service was required.
2. ———: ———: **WHO ENTITLED TO: RAILROAD COMPANY.** Where, after land has been sold for taxes, a railroad company condemns (though without notice to the tax purchaser) and takes possession of a right of way over the land, it is entitled to redeem from the tax sale, and to personal service of notice to redeem, and it is not affected by a tax deed made without such notice.
3. **Railroads: CONDEMNATION OF RIGHT OF WAY: NOTICE TO TAX PURCHASER.** The rights of a purchaser at tax sale are not extinguished by *ad quod damnum* proceedings to which he has not been made a party by proper notice.
4. **Practice in Supreme Court: EVIDENCE.** Evidence upon the merits cannot be introduced for the first time in this court.

Appeal from Webster District Court.

WEDNESDAY, DECEMBER 3.

ACTION to quiet title to a quarter section of land. Plaintiff claims title to the land under certain tax deeds. The defendant, the Toledo & Northwestern Railway Company, alleges that it is in possession of a strip one hundred feet in width across one forty-acre tract of the land, and that it occupies the same as a right of way for its railroad, the same having been condemned for that purpose by *ad quod damnum* proceedings. The defendant, Abtil Sturgeon, in his answer, denies that plaintiff is the owner of the land, and alleges that he is the owner thereof, except the strip occupied by the rail-

road company, whose right he admits. He also alleges that the tax deeds under which plaintiff claims the land are void, for the reason that no notices of the expiration of the period for redemption were served as required by law, and that, when the treasurer executed said deeds, there was no proper evidence on file in his office that said notices had been served; and in a cross-petition, he prayed that said tax deeds be canceled and set aside, and that his right to redeem the land from the tax sales be established. The district court dismissed plaintiff's petition, and entered judgment for defendants, granting the relief prayed for in the cross-petition. Plaintiff appeals.

R. M. Wright, for plaintiff.

Hull & Whitaker, for defendant, Sturgeon. *Hubbard, Clark & Dawley*, for defendant, the Toledo & Northwestern Railroad Company.

REED, J.—The land in question is the southwest quarter of section eighteen, township eighty-six, range twenty-seven. The east half was sold October 2, 1876, for the taxes of 1873, 1874 and 1875, and the deed was executed October 9, 1879. The west half was sold October 6, 1879, for the taxes of 1878, and the deed was executed October 21, 1882. The land occupied by the railroad for right of way is in the northwest quarter of said southwest quarter, and the *ad quod damnum* proceedings under which it claims were had in October, 1880, but plaintiff was not made a party to the proceedings. On the eleventh of July, 1879, plaintiff filed in the office of the treasurer a notice of the expiration of the period of redemption from the sale of 1876, together with the affidavit of the publisher of the Webster county *Gazette*, in which he swears that said notice was published in said paper three consecutive weeks, commencing on the twenty-eighth of June, 1879. Attached to this was plaintiff's affidavit, in which he swore that he was then the holder of the certificate of purchase

referred to in the notice, and "that said notice was served by publication in the Webster county *Gazette*, as above stated," and this was the only evidence of the service of said notice on file in the treasurer's office when the deed of October 9, 1879, was executed. On the twenty-first of July, 1882, he filed a notice of the expiration of the period of redemption from the sale of 1879, accompanied by the affidavit of the foreman of the *Messenger*, a newspaper published in Webster county, in which he swore that the notice had been published in said paper for three consecutive weeks, commencing on the seventh of July, 1882. Attached to this was plaintiff's affidavit, in which he swore that he was the holder of the certificate referred to in the notice, and that the notice was served by publication in the *Messenger* for three consecutive weeks, the last of which was published on the twenty-first of July, 1882, and this was the only evidence of the service of said notice on file in the treasurer's office when the deed of October 21, 1882, was executed.

Defendant's position is that, as the treasurer is authorized to execute the deed only when "an affidavit of the service of the notice and the particular mode thereof, duly signed and verified by the holder of the certificate of purchase, his agent or attorney, shall have been filed in his office," (Code, § 894,) and as the affidavits of plaintiff which were on file when the deeds were executed were insufficient, when considered separate from those of the publishers of the newspapers, to show either the service of the notice or the particular mode thereof, the execution of the deeds was unauthorized, and hence the land is still subject to the right of redemption from the sales. It will be important to inquire as to the soundness of this position only in case it shall be found that the service of notice of the expiration of the periods for redemption from the sales was, under the facts of the case, an essential prerequisite to the execution or the deed.

We have held in *Fuller v. Armstrong*, 53 Iowa, 683; *Tuttle v. Griffin*, 64 Id., 455; *Chambers v. Haddock*, Id.,

1. TAX sale and deed : notice : when not necessary to validity of deed : presumption arising from deed.

556; and *Meredith v. Phelps*, ante, p. 118, that when the land is unoccupied, and is taxed as unknown, there is no person on whom the notice can be served, and that the authority of the treasurer to execute the deed in such case is not dependent on the service of the notice. We have also held that, as the deed is, by statute, made presumptive evidence of the regularity of all the proceedings anterior to its execution, on which it is based, when there is no evidence on the question, the presumption is that the facts were such as that the service of notice was not essential.

The railroad company was in actual possession of the strip of land condemned by the *ad quod damnum* proceedings when the deed, which conveys to plaintiff the forty-acre tract in which the strip is situated, was executed. It was, therefore, entitled, under the statute, to notice of the expiration of the period for redemption. The notice which it is claimed was published is insufficient, so far as it is concerned, for two reasons quite independent of those stated above: (1) As it was in actual possession, the notice should have been personally served upon it in the manner provided for the service of original notices. Code, § 894. (2) The notice published was to Sturgeon, and, if the railroad company might have been served by publication of the notice, it certainly was not affected by the publication of a notice running to another party. It acquired its right to the strip of land after the tract in which it is situated had been sold to plaintiff. As it did not

3. RAILROADS: condemnation of right of way : notice to tax purchaser.

make him a party to the condemnation proceedings, he is not affected thereby. *Cochran v. Independent School Dist. Council Bluffs*, 50 Iowa, 663. Whatever right it acquired thereunder was subject to his rights under the tax sale. It acquired the right, however, to redeem the land from the sale, and, as it has not been served with notice of the expiration of the period for redemption, the tax deed does not operate to

extinguish that right. Plaintiff was, therefore, not entitled to have the title quieted as against it, and the judgment dismissing his petition against it is clearly right. The railroad company did not ask for any affirmative relief. We do not, therefore, determine whether it has the right to redeem the whole forty-acre tract in which its right of way is situated, or whether its right in this respect is limited to the strip which it occupies. As to the remainder of the land, there is no evidence on the question whether it was occupied or taxed to any person during either of the years in which the deeds were executed.

True, counsel in their argument have set out what purports to be a certificate of the county treasurer, in which he states that the lands were taxed in those years to defendant, Sturgeon. But it is not claimed that this certificate was introduced in evidence in the district court. We cannot, therefore, consider it here. Under the rule, then, established by the cases cited above, the presumption is that the deeds, as against defendant, Sturgeon, are valid. The judgment, then, in so far as it dismisses plaintiff's petition against defendant, the Toledo & Northwestern Railroad Company, is affirmed. But, in so far as it dismisses the petition as against defendant, Sturgeon, and establishes his right to redeem the land from the tax sales, it is

REVERSED.

4. PRACTICE
in supreme
court: evi-
dence.

65	152
95	157

65	152
110	35

65	152
124	627
124	629

RAYMOND V. THE BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y CO.

1. **Evidence: PRIVILEGED COMMUNICATION: PHYSICIAN AND PATIENT.**
Where one injured upon a railroad was attended by the company's surgeon, a communication made by him to the surgeon in response to a question asked for the purpose of ascertaining the facts in order properly to treat him, was a privileged communication, within the meaning of section 3643 of the Code.
2. ———: ———: **MADE TO PARTNER OF PHYSICIAN.** It would violate the spirit of the statute to permit a physician to disclose a privileged communication made in his presence to his partner.
3. **Carrier of Passengers: DEGREE OF DILIGENCE REQUIRED OF.** It is the duty of a common carrier of passengers to exercise extraordinary care and caution for the safety of its passengers.
4. **Contributory Negligence: AVOIDANCE OF BY PLAINTIFF: EVIDENCE: INSTRUCTION.** In an action for personal injury on a railroad, an instruction which held, in substance, that, if the plaintiff showed what his *acts* were, and they did not appear to be negligent, the jury would be justified in finding that he was free from negligence, while not correct as an abstract statement of the rule, was not erroneous in this case, where it was clear that plaintiff was not guilty of contributory negligence, unless it was by reason of something which he did.
5. ———: **ACTS OF COMMISSION AND OMISSION: EVIDENCE: BURDEN OF PROOF.** Where in such a case there is no evidence of contributory negligence on plaintiff's part by reason of any omission, and no question in regard to the surrounding circumstances, and the only inquiry is as to whether the injured person, in view of the conceded circumstances, was negligent in what he did, and, upon proof of his *acts*, it appears that he was not guilty of any negligence in what he did, the burden of proof is shifted upon defendant, if it claims that plaintiff was negligent, to establish it.

Appeal from Linn Circuit Court.

WEDNESDAY, DECEMBER 3.

ACTION to recover for injuries alleged to have been sustained by being thrown from the platform of the defendant's car by reason of the sudden and careless starting of the train, while the plaintiff, as a passenger, was in the act of

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leaving it at a station. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

S. K. Tracy, for appellant.

Stoneman, Rickel & Eastman, for appellee.

ADAMS, J.—This case is before us upon a rehearing. The opinion now filed is not substantially different from the former, except in regard to one instruction, which was held to be erroneous.

I. The defendant introduced as a witness Dr. J. R. Kinney, who testified that he was surgeon of the defendant, and was called to attend plaintiff; that he asked him some questions in regard to his injury; that he wanted information to enable him to judge if the company was responsible; that it was absolutely necessary for him to enable him to obtain a diagnosis, and that all surgeons do that. He also testified that the injury would be more severe if the cars were in motion. The defendant also introduced Dr. H. Ristine, who testified that he was a physician, and was called to assist Dr. Kinney in treating the plaintiff; that he asked the plaintiff how he got hurt, and heard him state how the accident happened, in the presence of Dr. Kinney and Dr. J. M. Ristine. The defendant then asked the witness the following question: "Now I will ask you to state what the plaintiff said, if anything, as to how the accident occurred, and how he got injured?" The plaintiff objected to the question as calling for a professional communication necessary and proper to enable the doctor to exercise his professional functions. In answer to a question by the court, the witness stated that he was called as consulting physician, and asked this question for the purpose of ascertaining the facts in order to properly treat him. The court thereupon sustained the objection. The defendant thereupon offered to show by this witness that

1. EVIDENCE:
privileged
communica-
tion: physi-
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tient.

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the plaintiff, in response to questions asked, stated that he stepped off the car while it was in motion, and thus fell and received the injury sued for. The court excluded the evidence, and the defendant assigns the action of the court as error.

The Code, § 3643, provides: "No practicing attorney, counselor, physician, surgeon, minister of the gospel, or priest of any denomination shall be allowed, in giving testimony, to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline." Dr. Ristine testified that the communication was made by the plaintiff in response to a question asked for the purpose of ascertaining the facts, in order to properly treat him; and Dr. Kinney testified that the injury would be more severe if the cars were in motion. In view of this testimony, we think the communication comes within the protection of the statute.

II. The defendant also introduced Dr. J. M. Ristine, who testified that he was a partner of Dr. H. Ristine, and
 2. —: —: heard the statements made to him. The defend-
 made to part- ant offered to prove by this witness the same
 ner of a phy- communication sought to be proved by Dr. H.
 sician. Ristine, and claimed the right to do so upon the ground that the communication was not made to this witness, but merely in his hearing. Manifestly, it would violate the spirit of the statute to permit a physician to disclose a communication made in his presence to his partner.

III. The defendant complains of an instruction given by the court, to the effect that it was the duty of the defendant,
 3. CARRIER as a common carrier of passengers, to exercise
 of passen- extraordinary care and caution; but it appears to
 gers: degree us that the rule of the instruction is well set-
 of diligence required of. tled. *Sales v. Western Stage Co.*, 4 Iowa, 547.

IV. The court gave an instruction in these words: "You

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have been instructed that the burden is upon the plaintiff to prove that he was free from contributory negligence; and the court further instructs you that such requirement of law is sufficiently complied with when the plaintiff has given in the testimony in his behalf, showing his act in relation to the transaction causing the injury to him, and such testimony fails to show contributory negligence on his part; but you are further charged that if you find, from a preponderance of the whole testimony in the case—that on the part of the defendant, as well as on the part of the plaintiff—that the plaintiff was guilty of contributory negligence, the plaintiff cannot recover, although the testimony of the plaintiff alone may fail to show such contributory negligence on his part.” Upon the former hearing, this instruction was held to be erroneous. Upon a re-examination of the case, we have come to the conclusion that the instruction, as applied to the particular facts of the case, can be approved.

The instruction holds, in substance, that, if the plaintiff showed what his *acts* were, and if they did not appear to be negligent, the jury would be justified in finding that he was free from negligence. It is manifest that the rule of the instruction, as an abstract one, could not be approved. It may happen, and sometimes does, that the person injured is guilty of negligence in what he omits to do. The inquiry of the jury should not, as a rule, be limited to the injured person's acts, but should be as broad as the circumstances of the case. The writer of this opinion thought, upon the former hearing, that the rule enunciated in the instruction was too narrow. But the facts of the case are such that it seems certain that the plaintiff was not guilty of contributory negligence, unless it was by reason of something which he did. The writer, therefore, is of the opinion now, and such is the opinion of the entire court, that the instruction is not liable to the objection mentioned.

But it is said that there is another objection to which it is

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liable, and that is that it does not maintain the established rule in regard to burden of proof. This view seemed plausible at first. It was adopted by Chief Justice Day, who wrote the former opinion, and was acquiesced in by a majority. But we are now agreed that it is not sound.

5. ———: acts
of commis-
sion and
omission: ev-
idence: bur-
den of proof.

The part of the instruction which the defendant objects to in this respect is that which holds, in substance, that if the plaintiff showed his acts in the transactions, and they *failed* to show contributory negligence, the burden upon this point would be shifted. As to this we may say, as we have already said of the instruction in other respects, that the rule could not be approved as an abstract one. The character of acts, as showing negligence or otherwise, often depends upon a great number of circumstances. We can conceive of a case where the plaintiff might prove the injured person's acts, and the jury, by reason of a want of knowledge of the circumstances, be left entirely in the dark as to whether they showed contributory negligence or freedom from it. In such case it could not be said that the rule of the instruction would be correct. But the case before us is not one of that kind. The character of the plaintiff's acts, so far as it depended upon circumstances, was clearly shown. The only question, then, is, was it sufficient to shift the burden of proof for the plaintiff to show his acts, if they failed to show contributory negligence? We think it was. Where there is no question of negligence by reason of an omission, and no question in regard to the surrounding circumstances, and the only question is as to whether the injured person, in view of the conceded circumstances, was negligent in what he did, we are unable to see how the plaintiff could do more than prove what he did. In proving what he did, he would prove what care he exercised; and acts fully disclosed and understood must always be deemed sufficiently careful which evince no negligence.

The true rule, and one of general application, appears to

us to be that stated in *Mayo v. Boston & M. R'y Co.*, 104 Mass., 140. It is stated in these words: "All the circumstances under which the injury was received being proved, if they show nothing in the conduct of the plaintiff, either of acts or neglect, to which the injury may be attributed in whole or in part, the inference of due care may be drawn from the absence of all appearance of fault."

The instruction given by the court below was not, we think, in view of the particular facts of the case, inconsistent with the rule above expressed, and the judgment must be

AFFIRMED.

RAY ET AL. V. TEABOUT ET AL.

65	157
86	343

1. **Fraudulent Conveyance: HUSBAND TO WIFE: EVIDENCE NOT ESTABLISHING.** Upon consideration of the evidence in this case, *held* that it is not sufficient to establish that a conveyance from husband to wife was fraudulent as against creditors of the husband.
2. ———: ———: **ESTOPPEL: FACTS NOT AMOUNTING TO.** Where a wife, long before her husband became indebted, was in the exclusive possession, by her tenants, of a farm, under an unrecorded conveyance from her husband, in which farm she had invested considerable of her own money, which, as between her and her husband, formed a consideration, in part at least, for the conveyance, and the deed was not withheld from record by her with any purpose on her part to aid her husband to incur indebtedness on the strength of the title as it appeared of record, *held* that she was not estopped from asserting her title as against her husband's creditors.
3. ———: **PLEADING: EVIDENCE.** Where defendant's title is attacked on the ground of fraud, he may, under a general denial, introduce any proof showing that his title is not fraudulent.
4. ———: **TO STRANGERS TO DELAY CREDITORS: KNOWLEDGE OF GRANTEE: EVIDENCE.** If it be admitted that the evidence in this case shows a fraudulent intent on the part of the grantor in making certain conveyances of land, it fails to show that the grantees had knowledge of such intent, or participated therein, and the conveyances are, therefore, sustained as against the creditors of the grantor.

Appeal from Winneshiek Circuit Court.

WEDNESDAY, DECEMBER 3.

THIS is an action in equity in the nature of a creditors' bill, by which it is sought to subject certain real estate to the payment of the debts of the insolvent partnership of Teabout & Valteau. The said real estate consists of a number of tracts of land, the legal titles to which are held in severalty by the defendants in the case. There was a trial to the court, and a decree was entered for the defendants. Plaintiffs appeal.

Willett & Willett, for appellants.

L. Bullis and C. Wellington, for appellees.

ROTHROCK, CH. J.—A number of parties were joined as plaintiffs. Each party plaintiff is the holder of a valid claim against the insolvent partnership. The lands which it is sought to subject to the payment of these claims are situated partly in Winneshiek and partly in other counties in this state, and some of the defendants are non-residents of Winneshiek county, the place where the action was brought and tried. Much of the argument of counsel for appellants is devoted to the question as to whether the bill is multifarious, and whether there is a misjoinder of parties. In the view we take of the case, a consideration of these questions becomes unnecessary, and we will proceed at once to a determination of the merits of the controversy, which involves the single ultimate question whether or not the transfers of the several parcels of real estate by Frank Teabout, one of the partners in the firm of Teabout & Valteau, were fraudulent as to the plaintiffs, who are creditors of the firm.

The record presented to us is very voluminous. The abstract contains 335 pages, and counsel, in their arguments, discuss at length, and in a most admirable manner, every

conceivable question of fact and law in the case. The record and arguments could not well be otherwise than voluminous, as the case involves several distinct cases in one. In determining the several issues involved, we will not attempt to review the evidence upon which we base our conclusions. We deem it sufficient to state our conclusions upon the material questions in the case. Indeed, we can do no more than this, because it is wholly impracticable to undertake a review of the evidence, and in our recital of what we regard as established by the evidence it will be understood that we have reference to weighing the evidence upon a careful examination of the abstract and arguments of counsel, having in view the conceded rule, that, as the defendants hold the legal titles to the property, the burden is on the plaintiffs to show that such titles are fraudulent by clear and satisfactory evidence. It is claimed with some confidence that there was a conspiracy entered into by the defendants, or some of them, to use the credit of the partnership of Teabout & Valleau to defraud the plaintiffs. We do not think there is evidence sufficient to establish that charge.

I. It appears from the record that Frank Teabout is about 67 years of age. His wife, Emma Teabout, is now about 70 years of age. They were married early in life, and removed from the east to Winneshiek county in 1851, and purchased some land, the title to which was taken in the name of the husband.

1. FRAUDULENT conveyance: husband to wife: evidence not establishing.

This land was improved, and was the homestead of both the parties until the year 1873. Before removing to Winneshiek county, Frank Teabout absented himself from his said wife, and went to California and Mexico, where he remained some four or five years. During his absence his wife, by her own efforts, accumulated some money. This money was invested in the land in Winneshiek county, so that, whether or not she had thereby any legal right to the land, it was always understood in the family and in the neighborhood that the farm belonged to Emma Teabout. It adjoined the village

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of Frankville, and in these proceedings it is designated as the Frankville farm, and is worth at least \$10,000.

About the year 1873 Frank Teabout commenced dealing in western lands in the counties of Clay, O'Brien, Osceola, and Sioux, in this state. He took up his residence in the western part of the state about that time, and his wife remained upon the Frankville farm. There was no separation by reason of any disagreement, so far as appears, but it seems that by common consent the wife remained upon the farm, while he, probably for the purpose of giving attention to his business in the west, absented himself from the farm. After that, his wife rented out the farm, collected the rents of the tenants, and, as the tenants understood, she was the owner of the farm and had the undisputed control of it. In 1878 Teabout was not in debt, and it is conceded that he was then worth at least \$100,000. We think the evidence shows that he was then worth more than that amount.

On the twenty-ninth day of April, 1878, Emma Teabout executed and acknowledged a power of attorney to her husband, Frank Teabout, by which he was authorized and empowered to sell and convey any and all of said real estate in her name, or in which she had any interest, including right of dower in any real estate of her husband. This power of attorney was filed for record June 5, 1878, and it does not appear that it has ever been revoked. On the same day on which the power of attorney was filed for record, Frank Teabout conveyed the Frankville farm to his wife, Emma Teabout, by a deed with covenants of general warranty. This deed was duly acknowledged, and was deposited with Warren Walker, the notary before whom the acknowledgment was taken for the grantee therein named. Emma Teabout was not present when the deed was executed. It was not filed for record until after the firm of Teabout & Vallean became insolvent. It is very satisfactorily shown by the evidence that these instruments were both executed without any purpose upon the part of Frank Teabout to contract indebtedness

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in the future. As has been said, he was not then in debt, and he was not then engaged in any business in which he contemplated the incurring of indebtedness.

The partnership of Teabout & Vallean was entered into in September, 1878. It contemplated buying and selling produce, cutting, curing, and marketing hay, and raising and selling cattle, in the counties of O'Brien, Sioux, Clay and Lyon, or such other points as might be agreed upon. Teabout agreed to furnish the sum of \$5,000 as capital stock. Vallean was not a man of any property, and against Teabout's capital he put in his skill, labor, and service, and each were to share alike in the profits. The firm had its principal office at Decorah. It did not confine itself to the business above mentioned, and in a short time the partnership had two or three general stores, and several lumber-yards, at points on the Milwaukee & St. Paul Railroad west of Decorah, in this state, and in the territory of Dakota. A very large business was done, amounting, it is claimed, to about \$800,000 a year; and in the last days of April, 1881, the partnership failed, being indebted many thousands of dollars in excess of its assets, and in excess of the individual property of its members. Vallean was the business man of the firm. Teabout knew nothing about the business, excepting that in the last year he knew that it was in debt, and that he was frequently called upon to provide means for the payment of its debts.

So far as the title of the Frankville farm appeared of record, it was the property of Frank Teabout until after the failure of the partnership, when the deed to Emma Teabout was put on record.

It is claimed that, as the plaintiff's debts were contracted while the title appeared of record to be in Frank Teabout, and on the faith of said ownership, Emma Teabout is estopped from setting up title against the claims of plaintiffs. We think this argument is fully answered by two or three considerations: (1) Long before these debts were contracted, Emma Teabout was in the

2. —: —: —:
estoppel:
facts not
amounting to.

exclusive possession by her tenants of the farm under a conveyance from her husband. An inquiry upon the farm, of those in possession, would have developed the fact that the tenants were the tenants of Mrs. Teabout. (2) The money earned by Emma Teabout during the absence of her husband was invested in the Frankville farm, and, as between her and her husband, it formed a consideration in part, at least, for the conveyance of the farm to her. (3) The deed was not withheld from record by Emma Teabout with any purpose on her part to aid her husband to incur indebtedness on the strength of the title as it appeared of record. Indeed, she knew nothing of the indebtedness of her husband until about the time the partnership failed.

The conveyance of the Frankville farm was not, therefore, a mere voluntary conveyance. It was upon a good and sufficient consideration, accompanied with possession exclusive in its character, and not such as might as well be considered the possession of the husband as the possession of the wife. Here, then, we have a conveyance for a consideration, coupled with actual possession, which is notice to the world of the rights of the grantee, and the mere neglect to file the deed for record cannot operate as an estoppel against the grantee.

Some question is made as to the right of Mrs. Teabout to avail herself of the fact of possession, and the consideration

3. ——— : paid for the conveyance, because she does not, in
pleading :
evidence. her answer, specially set forth these claims to the land. But we think, as the plaintiff attacks her title upon the ground of fraud, the general denial of her answer is sufficient to authorize any proof showing that her title is not fraudulent.

II. The other conveyances which it is claimed are fraudulent were made by Frank Teabout to the defendants G. H. Valteau, Warren Walker, C. Wellington, H. C. Woods, and M. H. Allen. Nearly all of the lands so conveyed are situated in the western counties above named. Without entering upon a separate

4. ——— : to
strangers to
delay credi-
tors : knowl-
edge of gran-
tees : evi-
dence.

discussion of the merits of each conveyance, we deem it sufficient to say that, while we might be inclined to hold that, as these conveyances were made a short time before the failure of the partnership, Frank Teabout may have made some of them in contemplation of insolvency, yet we think that the grantees are not shown to have had such knowledge of that intent as to charge them with any participation in any design to hinder, delay, or defraud the creditors of Teabout. It is true that some of these sales were made without any cash payments, and that mortgages were taken back for the whole of the purchase-money, and some of the grantees were unable to make the purchases and pay for the lands, and some of the lands appear to have been sold for less than such lands were probably worth. But it is shown beyond question that Teabout bought and sold thousands of acres of land in the same way long before he was indebted at all, and that part of his lands were held upon tax titles; that it was his mode of doing business to sell wholly on time, take mortgages, and sell the mortgages. In view of these facts, which were known to purchasers, we do not think they were chargeable with notice of any fraudulent purpose on the part of Teabout; and as to the purchases by G. H. Vallean, we are not prepared to hold, that the evidence that he made actual payment in cash is overcome by any established fact in the case.

Our conclusion upon the whole case is that the decrees of the circuit court must be

AFFIRMED.

EBERSOLE ET AL V. LATTIMER & INGLIS.

1. **Judgment by Default: CONCLUSIVENESS OF: COLLATERAL ATTACK.**

Where one makes default in answering a petition, and judgment is rendered against him pursuant to the allegations and prayer of the petition, he is bound thereby, and cannot, in an action to set aside the judgment, be granted relief which he might have had in the principal case had he appeared and made defense thereto.

Appeal from Franklin Circuit Court.

WEDNESDAY, DECEMBER 3.

ACTION in chancery to set aside, cancel, and declare satisfied a judgment rendered against plaintiff in a certain proceeding to foreclose a mortgage. A decree was rendered dismissing plaintiffs' petition, from which they appeal to this court.

McKenzie & Hemingway, for appellants.

D. W. Dow and *J. H. Bradley*, for appellees.

BECK, J.—I. The facts of the case are as follows: One Heming executed a mortgage upon three separate tracts of land to secure two promissory notes falling due at successive dates. Afterwards the plaintiffs, in consideration of the release of one of the tracts from the lien of the mortgage, executed a contract, indorsed upon the note first falling due, in the following words: "For value received, we hereby guarantee the payment of the within note at maturity." An action to foreclose the mortgage and recover judgment against plaintiffs upon this contract was brought by defendants in this action, and a decree was rendered therein, releasing one of the tracts from the mortgage, except so far as it was a lien for certain taxes paid by the holder of the mortgage, upon the ground of homestead rights thereto. The other

tracts were held subject to the lien of the mortgage, in different sums, which need not be more particularly referred to, and it was directed that each be sold in order to satisfy the amount adjudged against it. No question arises as to the apportionment of the sum due upon the mortgage to the different tracts. The decree, in its last paragraph, contains a judgment in the following language: "It is further ordered that plaintiffs, Lattimer & Inglis, have and recover of Neri Ebersole and Thomas Heming \$363.04, with interest at 10 per cent, and that they be adjudged \$39.05, costs of suit, and general execution will issue therefor." The petition upon which the decree was rendered prays for a foreclosure of the mortgage, and, after reciting the contract indorsed by plaintiffs upon one of the notes, as above set out, asks judgment against them for the amount of the face of the note, with interest according to its terms. To the petition plaintiffs made no answer, and the judgment was rendered against them by default. A special execution was issued upon the decree, and the lands were sold, according to its provisions, for an amount in excess of the judgment rendered against plaintiffs. The defendants in this action now seek to enforce that judgment.

II. Plaintiffs insist that, as they are mere guarantors of the note, they are in law liable thereon only in case the note is not collected, and that, as a sum in excess of the amount of the note has been realized by the sale of the lands, which are primarily liable, they are not liable on their guaranty, and therefore the judgment should not be enforced against them. We think plaintiffs' position cannot be maintained. The petition in the foreclosure case alleges an indebtedness against plaintiffs, and a judgment was rendered thereon without a condition. Their default admitted the right of recovery. Any defense to the judgment as claimed was thus waived. But, even if this be not so, the judgment must be regarded as the final adjudication of the rights and liabilities of the parties, and, if it be admitted that it is erroneous,

remaining unreversed, it cannot be questioned except for fraud, which is not shown. *Dewey v. Peck*, 33 Iowa, 242; *Hackworth v. Zollars*, 30 Iowa, 433; *Tredway v. McDonald*, 51 Iowa, 663; *Traer v. Whitman*, 56 Iowa, 443; *York v. Boardman*, 40 Iowa, 57. The judgment must be regarded as an adjudication of the rights of the parties. And, as plaintiffs' liability is therein determined to be absolute as principal debtors, and execution is awarded against them without condition, the judgment cannot in this proceeding be set aside.

III. Counsel for plaintiffs insist that the judgment is for a sum greater than the amount actually due on the note. If this may be shown to be so, it is but an error, and is no ground for setting the judgment aside.

IV. It is also insisted that the decree, considered with the petition, should be interpreted to be a judgment against plaintiffs as sureties; but, as will clearly appear upon the consideration of the language of the judgment, and the averments and prayer of the petition above set out, no such interpretation is admissible.

V. It is, lastly, insisted that the judgment is invalid, for the reason that it was rendered in vacation; but the record shows that the cause was tried at the term, and there was an agreement of parties that the decree should be rendered in vacation as of the term of the trial. The decree, however, shows on its face that it was entered during the term.

The foregoing discussion disposes of all questions in the case. The judgment of the circuit court is

AFFIRMED.

KING V. WILLIAMS.

1. **Duress: DEFINITION: EVIDENCE.** Duress is an actual or threatened violence or restraint of a man's person, contrary to law, to compel him to enter into a contract, or to discharge one; and the evidence in this case (see opinion) does not sustain the allegations of duress.

Appeal from Page District Court.

WEDNESDAY, DECEMBER 3.

ACTION AT LAW. The defendant pleaded a settlement, which the plaintiff replied had been obtained by "fraud and duress." Trial by jury, judgment for plaintiff, and defendant appeals.

Stockton & Keenan, for appellant.

James McCabe and *K. A. Pence*, for appellee.

SEEVERS, J.—The plaintiff claimed that the defendant had obtained money or property of him by means of fraudulent representations. When the settlement was made, the plaintiff refunded or paid to the defendant the money or property which the plaintiff claimed had been obtained by duress; and in relation to said money or property, and the settlement, the plaintiff testified that the defendant said: "If I did not make [pay] this back to him he would sue and make it warm for me. * * * He told me that the clerks and commissioners in the land-office said to him that if they had you [me] to deal with, they would prosecute you [me] criminally. He did [not] say that he did not want to do this, and that all he wanted was his money." The foregoing is all the evidence tending to show that the settlement was obtained by duress. The defendant asked the court to instruct the jury as follows: "There is no evidence tending to show that the settlement of September 9, 1882, was made by the parties while plaintiff, King, was under duress, and you should find for the defendant on this issue."

65	167
107	468
65	167
1132	324
132	549
65	167
142	7

 ROGERS v. WINCH.

This instruction was refused. It should have been given in our opinion. Duress has been defined to be "an actual or threatened violence or restraint of a man's person, contrary to law, to compel him to enter into a contract, or to discharge one." 1 Bouv., 454. It requires neither argument nor illustration to show that there was not a particle of evidence which tended to show duress as thus defined.

REVERSED.

65	168
79	176
65	168
110	488

 ROGERS v. WINCH.

1. **New Trial: EXCESSIVE DAMAGES: DISCRETION OF COURT: PRACTICE ON APPEAL.** When the trial judge has determined that the fair administration of the law demands that a new trial should be granted for any cause known to the law, this court will interfere only when it is clearly shown that he has abused the discretion which the law vests in him.
2. **Appeal to Supreme Court: RECORD.** A notice of a claim for an attorneys' lien is no part of the record as between plaintiff and defendant, and should not be embodied in the abstract on appeal.

Appeal from Monona District Court.

WEDNESDAY, DECEMBER 3.

ACTION for damages on account of an alleged assault and battery by defendant on plaintiff. There was a verdict for plaintiff, which was set aside by the district court, and the appeal is from that order.

G. W. McMillan and *S. H. Cochran*, for appellant.

J. W. Barnhart, for appellee.

REED, J.—The verdict awarded plaintiff \$2,000 as compensatory damages, and \$3,000 as exemplary damages. The district court set the verdict aside, and granted a new trial, on the ground that the damages were excessive, and appeared

Rogers v. Winch.

to have been given under the influence of passion and prejudice. It has often been held by this court that, when the trial judge has determined that the fair administration of the law demands that a new trial should be granted for any cause which the law recognizes as ground for a new trial, we will interfere with his action only when it is clearly shown that he has abused the discretion with which the law vests him. We have examined the evidence on which this verdict was found with care, and we have to say that, in our opinion, the district court was fully warranted in setting it aside. As the cause will probably be tried again, we do not think it would be proper for us to set out or comment upon the evidence further than to say that, conceding the facts of the transaction in question to be as plaintiff claims they are, we have never known so large a verdict to be sustained on such a state of facts.

In an amended abstract filed by appellee, he sets out as part of the record a notice served by plaintiff's counsel on defendant, after the verdict was returned, notifying him that he claimed an attorney's lien on any judgment that might be rendered thereon. Plaintiff filed a motion to strike out this portion of the abstract. This motion is sustained. The notice in question in no manner pertains to the record as between plaintiff and defendant, and it was improperly embodied in the abstract.

AFFIRMED.

WARDER, MITCHELL & GLESSNER V. SCHWARTZ ET AL.

1. **Appeal to Supreme Court:** NO JURISDICTION WHERE NO JUDGMENT SHOWN. This court has no jurisdiction to decide questions, even with the consent of the parties, where the record fails to show that a judgment was rendered below from which an appeal has been taken.

Appeal from Clinton Circuit Court.

THURSDAY, DECEMBER 4.

ACTION at law upon a written order for a harvester and binding cord. The cause was tried to the court without a jury, and defendants appeal.

W. C. Grohe and *Ellis & McCoy*, for appellants.

M. Corning and *A. R. Cotton*, for appellees.

BECK, J.—I. The petition declares upon a written instrument, whereby defendants ordered a Champion harvester, and undertook to execute their note for the price specified, upon receipt of the harvester. The instrument also contains an order for binding cord, the price of which is fixed therein. The petition alleges the delivery of the harvester and cord under the order.

II. Defendants in their answer set up as a defense an understanding and agreement made between the parties, before or at the time of the execution of the order, that there should be a trial of the machine in competition with a harvester made and sold by other manufacturers, and that defendants should have the right to select the successful machine, and, if the harvester ordered was not successful in the contest, the order should not be binding upon defendants, and the machine might be returned by them.

III. It may be observed that the familiar rule of the law, which does not permit a written instrument to be varied or

changed by evidence of a prior or contemporaneous parol contract, seems to be an inseparable barrier to defendants' defense.

IV. But the case is not so presented that we can take cognizance of it. The abstract fails to show that any judgment was rendered in the case. It is not even stated by counsel that there was a judgment in the court below. We cannot, therefore, determine the case. *Pittman v. Pittman*, 56 Iowa, 769. It is true that counsel for plaintiff do not raise the objection that no judgment is shown by the record. But, as the existence of the judgment is a jurisdictional fact, their silence will not supply the omission of the record, and give us jurisdiction. We have no authority to decide questions, even with the consent of the parties, unless there has been a judgment in the court below from which an appeal will lie.

AFFIRMED.

McDONALD & Co. v. MOORE ET AL.

65	171
102	257
65	171
140	647

- 1. Garnishment: EVIDENCE OF: ADMISSION BY GARNISHEE: INSTRUCTION.** One cannot be held as a garnishee unless he has been legally garnished, even though he appear and answer interrogatories; and where, in such case, the garnishee denied the fact of garnishment, the only proper evidence to establish that he had been garnished was the writ and the return thereon; (*Rock v. Singmaster*, 62 Iowa, 511;) and, no such evidence being offered, it was error for the court to give an instruction which assumed that there had been a garnishment.
- 2. —: CONTOVERTING ANSWER OF GARNISHEE: IRRELEVANT ALLEGATIONS.** Allegations pleaded to controvert the answers of a garnishee, when they do not tend to establish his liability as such, should be stricken out on motion. For example, see opinion.
- 3. Evidence Out of Order: RIGHT TO REBUT.** Where a point has been gone over in the introduction of evidence, but the plaintiff is permitted afterwards to introduce upon the same point further evidence, which was before omitted by oversight, the defendant should ordinarily have a right to rebut such new evidence. For example, see opinion.

Appeal from Adams District Court.

THURSDAY, DECEMBER 4.

THE plaintiffs are creditors of the defendant, Alphonso Moore. As such they brought this action against him, and in their petition they prayed for a writ of attachment. Some proceeding appears to have been had, under which they claimed to have garnished R. A. Moore. The latter appeared, and denied all indebtedness to A. Moore, and denied that he held property belonging to him. He admitted that he took possession of a certain stock of goods belonging to A. Moore, but averred that A. Moore was indebted to him, and executed a chattel mortgage upon the property to secure him; that he took possession only under his chattel mortgage; that he afterwards foreclosed the mortgage, and caused the property to be sold, and that the same did not sell for enough to pay the mortgage debt. The plaintiffs took issue upon the answer, setting up, among other things, that the mortgage was fraudulent; that the garnishee was in fact a secret partner with A. Moore, and that the stock was owned by them as partners; and that the mortgage was executed for the purpose of defrauding creditors. There was a trial to a jury, and verdict and judgment were rendered against the garnishee. He appeals.

Davis, Wells & Russell and *T. L. Maxwell*, for appellants.

T. M. Stuart and *W. O. Mitchell*, for appellees.

ADAMS, J.—I. The plaintiffs, in taking issue upon the answer of the garnishee, averred, among other things, "that on the twenty-eighth day of January, 1882, the plaintiffs sued out a writ of attachment against the goods and chattels and other property of said A. Moore, which said writ was placed in the hands of the sheriff of Adams county, and that by virtue

of said writ the sheriff did, on the twenty-eighth day of January, 1882, * * * garnish the said R. A. Moore." The garnishee took issue upon this pleading by denying the same. On the trial it does not appear that any writ of attachment was introduced in evidence. The court, nevertheless, in an instruction given, assumed that a writ of attachment was sued out, and that R. A. Moore was garnished under it. The garnishee assigns as error the giving of this instruction. The fact that the writ, if any was issued and served, was not introduced in evidence, does not appear to have been called specifically to the attention of the court. The instruction was, doubtless, given upon the supposition that the writ and return of service thereof had been introduced, or that the issuance and service of the writ had been virtually admitted.

The plaintiffs contend that the instruction can be sustained upon either one of two grounds: In the first place, they say that the garnishee appeared and submitted to the jurisdiction of the court, filing his answer to interrogatories, and asking to be discharged thereon; and they contend that the jurisdiction thus acquired was all that was necessary, and that it was immaterial whether there had in fact been any garnishment or not. But in our opinion the position cannot be sustained. Garnishment is in the nature of a proceeding *in rem*. Drake Attachm., § 452. In all proceedings *in rem*, the thing against which the proceedings are directed must be brought within the jurisdiction of the court by a virtual seizure thereof. In *Desha v. Baker*, 3 Ark., 509, there was an attempted garnishment, but the writ was not legally served. It was held that the garnishment could not be sustained, though the supposed garnishee had answered, admitting an indebtedness. But the plaintiffs contend that there was in fact a garnishment, and that there is enough in the record to show it. The fact that the alleged garnishee asked to be discharged as garnishee they say was a virtual admission that he had been garnished. But in our opinion the

prayer for a discharge cannot be understood as containing an admission. It was merely a prayer to be discharged from alleged liability. And the fact that he based his prayer solely upon allegations which, if true, would show that he was not liable to be charged, even in a valid proceeding, can make no difference. Afterwards, when the plaintiff put his liability in issue, it was his right, if he saw fit, to raise the question of the fact of garnishment. He was not precluded because he did not raise the question sooner, nor because he might have supposed that the alleged proceedings in garnishment were valid. When the fact of garnishment is put in issue, the proper evidence of it is the same as the evidence of any levy, to-wit, the writ and return thereon. *Rock v. Singmaster*, 62 Iowa, 511. In the instruction given, assuming that there was a valid garnishment, we have to say that we think that the court erred.

II. While it appears to us that there was no proper evidence of garnishment, and, if there was no garnishment, the other questions presented in the case could not arise again, yet, as there may have been a garnishment, and as the plaintiffs may be able to show it upon another trial, we have felt called upon to determine a part of the other questions. The plaintiffs, in putting in issue the question of the garnishee's liability, averred "that said R. A. Moore was a silent partner in the business carried on in the name of A. Moore, and had charge and control of the same; that he had an interest in the profits, and received most if not all of the money arising from the sale of the goods." The garnishee moved to strike out the allegations as to partnership and interest in the goods, and receipt of proceeds of sales. The court overruled the motion, and the garnishee assigns the ruling as error. The object of this proceeding was to reach a stock of goods in the the garnishee's hands, which was the stock above referred to.

The averment that the Moores were partners in the business in which the goods were purchased seems to us to be a

remarkable one. If R. A. Moore was a partner, as averred, he was originally liable to the plaintiffs, who sold the goods. We are unable to comprehend why, if this is so, they should undertake to charge him by the indirect proceeding of garnishment. Proof that he was partner would have defeated them. If he held the goods as partner, he could not be held as garnishee on account of them. We suspect, indeed, that they did not expect to establish the fact of partnership. They say in their argument that they only averred the fact as evidence of fraud in taking the mortgage. They seemed to regard the *averment* as worth something for *that purpose*, even though the fact averred, if *proven*, might be fatal to them. It was, of course, not allowable to avail themselves of the averment for the introduction of evidence which might awaken a mere suspicion of fraud, to be used as a make-weight with other evidence. We think, therefore, that the averment should have been stricken out. In this connection we ought to say that our attention is called to the fact that the jury found specially that there was no partnership; and it is insisted that the garnishee was not prejudiced. Possibly, we might not feel justified in reversing upon this ground alone; but, as the case is to be remanded for another trial, it is proper that we should point out what we deem to be error. Besides, among the allegations which the garnishee moved to strike out was one to the effect that he received the proceeds of sales. That did not tend to show fraud in taking the mortgage. Nor was the finding of the jury such that we could say that the error in allowing the allegations to stand was without prejudice.

III. During the argument of the case, it was discovered by the plaintiff that they had omitted to introduce in evidence a certain account-book belonging to A. Moore. The court, upon application, regarding the omission as an oversight, allowed it to be introduced at that time. This book showed a balance of account of about \$300 due A. Moore from the garnishee, and it appears to have been due at the

time A. Moore executed to the garnishee a mortgage upon his stock. Strictly, we suppose, this balance should have been ascertained and applied in reduction of the debt for which the mortgage was given, but for some reason this was not done. Upon the introduction of the book, the garnishee asked leave to call A. Moore to explain the account, which leave the court refused to grant; and the court proceeded to instruct the jury that if A. Moore was insolvent, and the garnishee knew it, and took a mortgage for more than was due him, such fact would be a badge of fraud, and, if unexplained, would justify the jury in finding the mortgage fraudulent.

The garnishee contends that the court erred in refusing to allow him to call A. Moore to explain the book-account. The offer to explain the book-account was a very indefinite one. Still, we think that the court should have allowed the witness to be called. What questions should have been allowed is another thing. It would have been competent to show, if such was the fact, that the mortgage was not executed at the place where the book was, and that it was not practicable to make the proper application upon the debt due the garnishee and balance the book at that time. He claims in argument that he could have shown such fact. The plaintiffs contend that the garnishee was not entitled to show such fact after the book was introduced, because he had an opportunity to show it before. The day before the book was introduced, A. Moore was examined in regard to it, and testified, in substance, that the garnishee owed him \$307, and that the same appeared on the book as a balance of account. He was asked by the plaintiffs a question in these words: "*Question.* He was taking your notes here, and a mortgage on your goods for what you owed him, and still, at the same time, he owed you \$307? *Answer.* It appears like that." It seems to be true, then, as the plaintiffs contend, that the essential fact calling for explanation had by this testimony been given in evidence, and by the very witness whom the

garnishee asked leave to recall. Still, as the plaintiffs deemed it necessary to put the book itself in evidence, as they did the next day, it is hardly their right now to claim that they did not strengthen their case by so doing; and, if they did strengthen it, we think it was the garnishee's right to give evidence in rebuttal.

We ought to say here that the court ruled the day before that the book, though not then in the court room, nor yet offered in evidence, might be *considered* as in evidence. But it appears that this was understood and treated by the plaintiff as a provisional ruling, to be followed by the actual introduction of the book, and when it was so followed we think it was the garnishee's right to call a witness in rebuttal. The trial court, it is true, has considerable discretion in the matter of the introduction of evidence. We should not feel justified in reversing every case where we should think the ruling might more properly have been otherwise. But the point upon which the evidence in question was sought to be introduced was one of such importance, and the irregularity, if any, on the part of the garnishee, was so slight, we think, that his request for leave to call a witness in rebuttal should not have been refused.

Some other questions are presented in this case, in regard to which we might not be agreed, and, as they may not arise upon another trial, we omit to determine them. For the errors pointed out the judgment must be

REVERSED.

FROST V. PARKER ET UX.

65	178
98	279
65	178
91	509
65	178
101	607
65	178
118	206
118	206
65	178
129	23
129	24
65	178
142	372

1. **Practice in Supreme Court: RECORD PERFECTED BY AMENDED ABSTRACT.** Although, on appeal to the supreme court, appellant's original abstract is insufficient to sustain the appeal, its defects may be cured by amendments subsequently filed.
2. —: **AMENDING ABSTRACT: LEAVE: NOTICE.** No leave of court or notice to the appellee is required to enable an appellant in the supreme court to file an amendment to his abstract.
3. **Husband and Wife: FAMILY EXPENSE: COST OF ORGAN: JUDGMENT AGAINST HUSBAND ALONE: ASSIGNMENT OF: SUBJECTION OF WIFE'S PROPERTY TO: STATUTE OF LIMITATIONS.** The cost of an organ, though purchased by the husband for resale, but never actually sold by him, but ever afterwards (for about seven years) used in his family, as organs are ordinarily used, is a family expense, for which the property of the wife is chargeable, under section 2214 of the Code, following *Smedley v. Felt*, 41 Iowa, 588, and other cases cited in opinion. And though the husband gave his individual note for the organ, which was put into judgment against him alone, and the judgment assigned to a third party, the assignee was entitled, upon a showing of the facts in a proper proceeding, to have the wife's property subjected to the payment of the judgment; and such right was not barred by the statute of limitations so long as the debt, in the form which it had assumed, was not barred as against the husband.
4. **Appeal to Supreme Court: TRIAL DE NOVO: RIGHTS OF PARTY NOT APPEALING.** On appeal to the supreme court, even when the cause is triable *de novo*, a party who does not appeal from the judgment below cannot have any more favorable judgment in this court, though it appears from the record that he was entitled to a better judgment in the court below.

Appeal from Cerro Gordo District Court.

THURSDAY, DECEMBER 4.

ACTION in chancery to subject certain lands of the wife to a judgment against her husband. There was a decree in the district court subjecting a part of the lands to the judgment. The wife appeals.

Lee & Adams, for appellant.

Bush & Hurn, for appellee.

BECK, J.—I. The defendants are husband and wife. The petition shows that in 1876 a judgment was rendered against the husband, which was subsequently assigned to plaintiff; that the notes upon which the judgment was rendered were executed by the husband for an organ, purchased by both husband and wife for use in their family, and so used, and that its purchase was a part of the family expenses; that, when the suit on the notes was commenced, the husband was the owner of certain land, which he subsequently conveyed to one Brayton, who immediately conveyed it to the wife; that these conveyances were fraudulent, being made for the purpose of defeating the plaintiff in the collection of his judgment; that, subsequent to the rendition of the judgment, the wife purchased certain village lots, the title of which, as well as the title of the land, she still retains; and that plaintiff has caused an execution to be issued upon the judgment and levied on the land and lots. The petition charges that the conveyances for the land are fraudulent, and prays that they may be so declared, and further prays that the lots may be declared to be subject to plaintiff's judgment, for the reason that the debt for which it was rendered was contracted for family expenses. It also prays that the judgment be, for the same reason, enforced against the individual property of the wife. The purchase of the organ, and the existence of the debt therefor, and the rendition of the judgment, are inferentially admitted in the answer. Other allegations of the petition are denied. As further defense, it is alleged that it was agreed by the vendor of the organ that he would look to the husband alone for payment, and that the wife was not to be liable therefor; that the husband bought the instrument for the purpose of trade, and not for the use of his family, and that it was not so used in the family; that no recovery therefor has been had against the wife; and that recovery against the wife on account of the purchase of the organ is barred by the statute of limitations.

II. Counsel for plaintiff object to the consideration of the

case, on the ground that the original abstract fails to show that an appeal was taken in the case, or that the evidence was taken in writing, pursuant to an order of the court, or that it presents all the evidence. But, by an amendment to appellant's abstracts, all of these matters are properly shown. The abstract, as amended, is not denied; it must, therefore, be taken as true. This is a sufficient answer to the objection

1. PRACTICE in
supreme
court: record
perfected by
amended ab-
stract.

first stated. A motion to strike the amended abstract, on the ground that it was filed without leave or notice, and after an agreement that the case should be submitted thereon, is overruled. Neither leave to file, nor notice, was necessary. No agreement is shown which waived defendant's right to file an amended abstract.

2. ———:
amending
abstract:
leave: notice.

III. The district court appears to have held that the wife was not liable for the debt incurred for the organ, and that it cannot be enforced against her property, but that the conveyances of the land under which she claims are fraudulent, as alleged in the petition. Upon this view of the case, a decree was entered, declaring the land subject to plaintiff's judgment, but holding that it cannot be enforced against the lots. The case is triable here *de novo*. We are required to determine the rights of the parties upon the record, without regard to the relief granted by the decree of the court below.

IV. We find it unnecessary to inquire into the good faith and validity of the deeds under which the wife claims title to the land, for the reason that, if it be conceded that they are valid, and that her title is not tainted by fraud, the land, as well as the lots, may in this action be held subject to plaintiff's judgment. We will proceed to state the grounds of our conclusions upon this branch of the case.

V. The organ was purchased by the husband in 1875. The wife was present when the purchase was made, and both

3. HUSBAND
and wife:
family ex-
pense: cost
of organ.

she and the husband testify that she informed the seller that she would not be liable for it. Their testimony fails to show an agreement by the seller

that he would look alone to the husband for payment. They unite in the statement, which is contradicted by the vendor's evidence, that the seller replied to her declaration that she would not pay for the instrument, by asserting that the husband's note was good enough. But this does not amount to proof of an agreement to relieve the wife of liability. It is insisted by defendants that the organ was not purchased by the husband for use in the family, but for the purpose of "speculation;" that is, for sale at a profit. It is shown that the husband did offer to sell the organ. But we conclude that, whatever may have been the husband's purpose at the time of the purchase, it was devoted to the use of the family. It was used by one of the daughters, who received instruction to some extent in the use of the instrument, and became able to play a little. Visitors used it. It was kept as any other article of family use from the time of its purchase, in 1875, to the day the testimony was taken, about seven years. Surely it cannot be regarded as an instrument kept for sale. We have held that the purchase of a piano for use in the family is a family expense, which may be charged against the property of the wife. *Smedley v. Felt*, 41 Iowa, 588. An organ comes under the same rule.

VI. It is urged by defendants that, as the wife was not a party to the case in which the judgment was entered, and no judgment has been rendered against her for the price of the organ, and, as the judgment alone, and not the claim or cause of action upon which it was rendered, was assigned to plaintiff, he cannot recover in this action. We will briefly consider these objections. Code, § 2214, provides that "the expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or of either of them, and in relation thereto they may be sued jointly or separately." Here a right is created and a liability declared, but no remedy is provided or pointed out. The right declared is that the creditor of the husband or wife, for

SAME: judgment against husband alone: assignment of wife's property to.

family expenses, may have a remedy against both. The liability created is that both shall be liable for family expenses. The remedy to enforce the provision is not pointed out, further than that the indebtedness contemplated by the provision may be "chargeable upon the property of both husband and wife." It has been held that under this provision each is personally liable. *Smedley v. Felt*, 41 Iowa, 588; *Lawrence v. Sinnamon*, 24 Id., 80; *Finn v. Rose*, 12 Id., 565; *Jones v. Glass*, 48 Id., 345; *Farrer v. Emery*, 52 Iowa, 725. But it cannot be held that the remedy under this provision is limited alone to a personal judgment, and that, by proper proceedings, the property of the wife may not be pursued without the claim for a personal judgment against her. This is precisely what plaintiff seeks to do in this case. No prejudice results to the wife by seeking to enforce the debt against her property without asking a personal judgment against her. The statute, in declaring that her property shall be charged, clearly implies that a remedy against it is contemplated.

VII. The action cannot be defeated on the ground that no assignment of the claim against the wife is shown. The wife was not a party to the original contract, nor
SAME. to the note. She was not a party to the action whereon the judgment was rendered. The evidence of the debt was changed from an oral contract to a note, and from the note to the judgment. The debt all the time continued the same. This debt was continually enforceable against the wife's property. Her liability followed the debt. An assignment of the claim as against her, therefore, is not necessary to authorize plaintiff to bring this action. See *Lawrence v. Sinnamon*, *supra*.

VIII. Regarding the liability of the wife as secondary, in a sense, as following the debt, it continues as long as a right
SAME: statute of limitations. of action exists against the husband. He may change the form of the evidence of the debt, so that the statute of limitations will not bar recovery; the

debt, enforceable at law, continues, and with it the wife's liability. *Lawrence v. Sinnamon, supra.*

IX. The plaintiff does not appeal, and does not complain of the decree of the court below. He must be regarded as being satisfied with it. Had he appealed, he would have been entitled to a decree subjecting to his judgment both the land and the lots. But, as he does not appeal, we cannot give him relief subjecting to his judgment property which was discharged by the decree of the court below, of which he does not complain.

4. APPEAL to
supreme
court: trial
de novo:
rights of
party not ap-
pealing.

AFFIRMED.

WILLIAMS V. THOMAS ET AL.

1. **Fraudulent Representations as to Value of Property:** EVIDENCE NOT ESTABLISHING. See opinion.
2. **Estates of Decedents:** DISCOVERY OF ASSETS: EVIDENCE. See opinion.
3. **Statute of Limitations:** ADVERSE POSSESSION OF LANDS. Twenty years' possession of land, under a claim of absolute title, which possession and claim were known to defendants, bars any right which the defendants may have had to assert an interest in the land.

Appeal from Des Moines Circuit Court.

THURSDAY, DECEMBER. 4.

ACTION in chancery to set aside a deed on account of misrepresentations and fraud, inducing its execution, and to recover for rents of the land conveyed, and for discovery of the assets of an estate of which plaintiff is sole heir. The defendants, Sarah and Frank Stokes, and A. J. and W. J. Williams, claim interests in the lands as heirs, and pray that their title be quieted. The circuit court, by its decree, rendered judgment against defendant, Thomas, for \$1,040, on

account of money of the estate received by him. Other relief prayed for by plaintiff against him was denied. The relief prayed for by the other defendants was wholly denied. Plaintiff, and all of defendants separately, appeal.

Hammack, Howard & Virgin and *S. L. Glasgow*, for plaintiff.

J. C. Powers and *Newman & Blake*, for defendant, Thomas.

Hedge & Blythe and *Dewey & Templin*, for defendants, Williams.

Palmer & Palmer, for defendants, Stokes.

BECK, J.—I. The petition alleges that plaintiff, who is a subject of the queen of England, residing in her dominions, is the sole heir of Mrs. Mary Jones, who died in Des Moines county, in 1879, seized of real estate in that county and in Louisa county, all of the value of \$8,000, at the time of her death, and that personal estate to the value of \$12,000 was also left by Mrs. Jones. It is further alleged that defendant, Thomas, and the deceased occupied together the lands involved in this action, and cultivated them jointly, and were equal owners of the personal property thereon, and the products thereof; that they were joint and equal owners of the lands situated in Louisa county; that defendant, Thomas, transacted all the business pertaining to the sale of stock and produce, leasing, collecting rents, etc., and that he had in his possession all of the notes and securities of Mrs. Jones, a large portion of which he has fraudulently converted to his own use. It is further alleged that defendant, Thomas, by false and fraudulent representation as to the value of the lands and the quantity of the personal estate, induced plaintiff to convey the lands and assign the personal property to him, for the consideration of \$3,500. It is alleged that the other defendants make some

claim to the property, but that they have no legal and valid interest therein. The defendants, Williams and Stokes, in their respective answers, set up a claim to an interest in the lands, as heirs of the husband of Mrs. Jones, who died, seized thereof, in 1856. The plaintiff and defendant, Thomas, both plead the statute of limitations as a bar to the claim and rights of defendants, Williams and Stokes.

II. We shall first determine whether the charge of fraudulent and false representations as to the value and quantity of the assets of the estate, which induced plaintiff to transfer his interest therein to defendant, is sustained by the evidence. The representations of defendant as to the value of the lands were not made in positive language, and, according to the evidence, are approximately correct. They were worth but little, if any, more than the value mentioned by defendant. The same remarks may be made in regard to the quantity and value of the personal assets of the estate, and probably adverse claims to the lands. It may be observed that plaintiff doubtless transferred the property upon the representations of defendant, as he never saw any of it. He lived in England, and was never in this country.

III. Plaintiff insists that certain notes claimed by defendant as his own property belonged to the estate. We think the proof does not support his position. The notes were found in the possession of defendant after Mrs. Jones' death, and about the only evidence that they were her property is the fact that they were payable to her or bearer. But there is other proof, besides defendant's possession, of his right to these notes. The business relations of the parties, their habits of transacting business, and other circumstances, tend to support our conclusion.

IV. Upon the death of Mrs. Jones, certain moneys were found in her possession, and were delivered to defendant. We

1. FRAUDULENT representations as to value of property: evidence not establishing.

2. ESTATES of decedents: discovery of assets: evidence.

THE SAME. think the defendant has failed to establish his right thereto, and that the decree of the circuit court in rendering judgment therefor is correct.

V. Mrs. Jones claimed the lands as her own upon the death of her husband, in 1856. Soon thereafter, Williams and Stokes set up a claim to them, which was resisted and denied by Mrs. Jones. The evidence clearly shows that she claimed, adversely to defendants, the absolute title to all interest in the lands, and denied the claim of defendants. Under this adverse claim she held the land for more than twenty years. Her claim was all the time known to defendants. We reach the conclusion that they are barred of these claims by the statute of limitations. We refrain from entering upon a discussion of the evidence in order to support our conclusions as to the facts. It is not our custom to consume time in the discussion of simple questions of fact. There is no question of law involved in the case about which there exists a doubt. It is our conclusion that the judgment of the circuit court ought to be

AFFIRMED.

65 186
89 128

WINCH V. NORMAN.

1. **Evidence: HANDWRITING: CLERK OF COURTS AS EXPERT.** A witness does not show himself to be qualified to testify as an expert upon a comparison of handwriting, by stating merely that he is a clerk of the courts, without stating also how long he has served in such office.
2. ———: ———: **STANDARD OF COMPARISON: HOW ESTABLISHED.** Where it is sought to prove, by comparison with another writing as a standard, that a certain writing was executed by the same person who wrote the standard writing, the execution of the standard by such person must be established by direct evidence, and not by comparison with some other writing.

Appeal from Harrison Circuit Court.

THURSDAY, DECEMBER 4.

ACTION upon a promissory note. The defendant pleaded usury. In addition he pleaded a counter-claim for damages alleged to have been sustained by the publication of a libel. The jury found the note to be usurious in part. They also found that the defendant was entitled to damages upon his counter-claim, and rendered a verdict for the defendant for \$207.34. Judgment having been rendered upon the verdict, the plaintiff appeals.

J. W. Barnhart, for appellant.

S. H. Cochran, for appellee.

ADAMS, J.—The libel set up in the defendant's counter-claim is alleged to have consisted in a publication made by sending through the mail, to one Louisa Vandusen, a postal card in these words: "My friends tell me you put your name to a security bond for your neighbor. I should think that you had enough of that business through life. He don't own or hold a cent in his name. Take your name off, sure. [Signed] F. F."

There was no direct evidence that the plaintiff wrote the postal card, but witnesses who were familiar with the plaintiff's signature testified in substance that they thought that there was some resemblance between the plaintiff's writing and a part of the writing on the postal card; and others testified as experts to a resemblance between what was admitted to be the plaintiff's writing and a part of the writing on the postal card. Among the witnesses examined in relation to the handwriting was one Hyde. He testified that he was familiar with the signature of the plaintiff, but not with his general handwriting, and that he thought that there was a resemblance between one letter on the postal card and the plaintiff's writing. He was also examined as an expert for the purpose of comparing certain admitted writing of the plaintiff with another postal card addressed to one Topping, and signed "J. W.," and was allowed to testify, against the objection of the plaintiff, that

he saw a resemblance between one letter in the Topping card and the plaintiff's admitted writing. The Topping card was then admitted in evidence to the jury, against the plaintiff's objection, for the purpose of enabling them to make a comparison between it and the alleged libelous card addressed to Louisa Vandusen.

The plaintiff contends that Hyde did not show himself to be qualified to testify as an expert from a comparison of plaintiff's admitted writing with the Topping card; and, even if he had been qualified, that it was error to allow the Topping card to be admitted in evidence for the purpose of a comparison to be made by the jury. Upon the question as to whether Hyde showed himself qualified to testify as an expert, we have to say that we find no evidence, except the witness' statement that he was the clerk of the courts of Harrison county. Without determining whether a person might not become qualified to testify as an expert from a comparison of writings by service in such office, it seems clear to us that he could not be so regarded without any reference to the length of time of such service. But upon this point the evidence discloses nothing. Such being the fact, we cannot say that there was any evidence whatever that Hyde was qualified to testify as an expert.

We have to say, also, that we think that, independently of the question of the expert character of Hyde, the court erred in admitting the evidence respecting the Topping card, and erred in allowing it to go to the jury. The object, of course, was to establish the Topping card as in the plaintiff's handwriting, and then ask the jury to infer by comparison that the Vandusen card in question was in his handwriting also. But we have seen no case where it has been held admissible to make a given writing the basis of comparison, where its own genuineness is shown only by comparison with some other writing. It appears to us that the genuineness of the writing made the basis of com-

1. EVIDENCE:
handwriting:
clerk of court
as expert.

2. — : — :
standard of
comparison:
how estab-
lished.

parison, called sometimes the standard writing, should be proved by direct or positive evidence. In *Hyde v. Woolfolk*, 1 Iowa, 162, the court said: "Two obvious methods of proving the standard writing are—*First*, by the testimony of a witness who saw the person write it; and, *Secondly*, by the party's admission, when not offered by himself. We do not mean to say that these are the only methods, but only that the proof must be positive." The court also said: "The very idea of proving handwriting by comparison implies, of necessity, the establishment of the genuineness of the standard. The court is not prepared to adopt the suggestion that the standard writing may be proved by witnesses who have only seen the party write, for this is in effect fixing the standard by comparison; it is supporting a probability by a probability." The foregoing, though perhaps not strictly necessary to be said in that case, meets our approval. If it were allowable to establish the genuineness of the writing on the Topping card, to be used as a standard writing, by mere expert evidence based upon comparison, it would be allowable to establish still a third writing as a standard writing by comparison with the Topping card, and a fourth by comparison with the third, and so on indefinitely, and all might then be given to the jury as genuine writings with which to make a comparison of the disputed writing.

Evidence of experts based upon comparison is, at best, not very reliable, and we do not think that we should be justified in holding that writing can be used as standard writing, the evidence of whose genuineness rests only in opinion. Some other questions are presented, arising upon the evidence, but, as the evidence may be different upon another trial, we do not feel called upon to determine them.

We think that the judgment of the circuit court must be

REVERSED.

65	190
85	47
65	190
117	648

MILNER V. COOPER & CO. ET AL.

1. **Landlord's Lien: ON STOCK OF GOODS OF FIRM DISSOLVED BY DEATH: REMEDY: RESTRAINT OF SALE BY SURVIVING PARTNER.** Where a mercantile firm was occupying for its business a leased store-room, and the firm was dissolved by the death of one of the partners, the landlord had a lien on the stock of goods for the rent which would accrue under the lease; but the surviving partner had also the right to close out the business in such manner as he might deem for the best interest of all concerned,—that is, the creditors of the firm, the representatives of the deceased partner, and himself; and the landlord was not in such case entitled to an injunction compelling the surviving partner to hold the goods till the expiration of the term of the lease, or to sell them only in the ordinary course of trade, especially where the surviving partner himself was a man of ample means. The law provides a more appropriate remedy, if any is needed, in such a case.

Appeal from Pottawattamie Circuit Court.

THURSDAY, DECEMBER 4.

THIS is an appeal from an order vacating a temporary injunction.

Fremont Benjamin, for appellant.

Wright & Baldwin, for appellees.

REED, J.—Plaintiff alleges in his petition that he leased to defendants, G. W. Cooper & Co., a store building, in the town of Oakland, at the monthly rent of forty dollars, to be paid monthly in advance; that defendants occupied said premises under the lease, and moved a stock of general merchandise into the building, and carried on there the business of a general store; that one member of the firm died, and that defendant, Stewart, was appointed administrator of his estate, and that he and defendant, Elwell, who was a member of the firm, entered into a contract with defendant, Crittenden, for the sale to him of said stock of goods, the object being to remove the goods from said premises, and thereby

defeat plaintiff's lien thereon for the rent of the premises yet to accrue under the lien, and by that means cheat and defraud him out of said rent; that the lease ran for three years, and the rent to accrue thereon in the future would amount to \$1,440; and the prayer of the petition is that defendants be enjoined from in any manner disposing of any of said property, or removing the same from the premises. On the filing of the petition, a temporary injunction was issued on the order of the judge of the circuit court, restraining defendants from disposing of the goods, except in the ordinary course of their business as retail merchants.

Defendant filed an answer; also a motion to vacate the temporary injunction. On the hearing of this motion, it was shown that the firm of G. W. Cooper & Co. was composed of A. J. Crittenden and G. W. Cooper. Cooper died some time before the suit was instituted, and defendant, Stewart, had been appointed administrator of his estate. During his life-time, Cooper had been in charge of the business of the firm; but, at his death, Crittenden had taken charge of it for the purpose of closing out the affairs of the firm, and, at the time of the commencement of this proceeding, he was negotiating with a third party for the sale of the stock of merchandise. The value of the stock was more than the amount of the rents which would accrue under the lease, and Crittenden is shown to be a man of large means. On this showing, the circuit court vacated the temporary injunction. We think this was right. By the death of Cooper, the partnership of which he was a member was dissolved, and the duty of winding up its affairs was devolved on Crittenden, the surviving partner. That plaintiff had a lien on the stock of merchandise in the leased building for the security of the rent which would accrue under the lease is certainly true. See *Garner v. Cutting*, 32 Iowa, 547; *Martin v. Stearns*, 52 Id., 345. But it does not necessarily follow that he has the right to have the goods held until the end of the term of the lease, or sold only in the ordinary course of the retail trade.

Milner v. Cooper & Co. et al.

A court of equity has jurisdiction, doubtless, to make such order with reference to their disposition as will protect plaintiff's rights, and, at the same time, do no absolute injustice to other parties in interest. If the surviving partner were bankrupt or incompetent, plaintiff would probably be entitled to have a receiver appointed, under Code, § 2903, to take charge of the property and apply the proceeds in satisfaction of his claim, and, if an injunction restraining the sale of the goods was necessary for the protection of his interest, it is not doubted that he would be entitled to that remedy.

A surviving partner, in winding up the affairs of the firm, acts as trustee for the creditors, the representatives of the deceased partner, and himself. Pars. Partn., 441. The assets of the firm constitute in his hands a trust fund for the benefit of the creditors and other parties in interest, and a court of equity will compel the application of this fund for the benefit of the *cestui que trust*. It also has power to remove the trustee and appoint an officer of its own to manage the estate and apply the fund, if the interest of those concerned demands that this be done. By virtue of his landlord's lien, plaintiff will have a prior claim on this trust fund in the hands of Crittenden. As the rent falls due, he will have the right to demand that it be paid out of the fund. If for any reason it should appear that the fund is insecure in the hands of the trustee, he will have the right to demand that a sufficient amount of it be paid into court, or to an officer appointed by the court, to satisfy his claim as it accrues. But, upon the present showing, it does not appear that any order is necessary for his protection; and to compel the surviving partner to hold the goods until the expiration of the term of the lease, or to sell them only in the ordinary course of trade, might work great injustice to other creditors, or the representatives of Cooper, and would be of no benefit to plaintiff. The order vacating the temporary injunction is therefore

AFFIRMED.

MAST & CO. V. HENRY ET AL.

1. **Voluntary Conveyance: FROM FATHER TO DAUGHTER: NOTICE OF PRIOR EQUITIES: PURCHASE OF TAX TITLE BY DAUGHTER: SUBJECTING PROPERTY TO FATHER'S DEBTS.** Where a daughter, without any consideration, but with no fraudulent intent, took from her father a conveyance of land, with knowledge of her father's indebtedness, she could not hold it free from liability to her father's creditors. But where the land was afterwards sold for taxes, and deeded to a *bona fide* purchaser, who deeded the same to the daughter, *held* that the title so obtained could not be assailed by the creditors of the father.

Appeal from Webster Circuit Court.

THURSDAY, DECEMBER 4.

ACTION in equity to subject real estate to payment of certain judgments recovered by the plaintiff against the defendant, G. W. Henry, which real estate, the plaintiff claims, Henry conveyed to his daughter and co-defendant, M. E. Henry, for the purpose of defrauding his creditors. The court found for the defendant, and entered a decree accordingly. The plaintiff appeals.

Frank Farrell, for appellant.

R. M. Wright, for appellee.

SEEVERS, J.—In 1874 Fiske & Co. recovered a judgment against both of the defendants, and Hapgood & Co. recovered a judgment about the same time against G. W. Henry alone. G. W. Bassett was attorney for the judgment plaintiffs. The evidence warrants the conclusion that M. E. Henry was the principal debtor on the Fiske judgment. At that time G. W. Henry was the owner of lot 1, in block 15, in Fort Dodge, and he conveyed the same to M. E. Henry on the first day of September, 1874. No consideration was paid by M. E. Henry for such conveyance. In the same month, but afterwards, Fiske & Co. sold said lot under exe-

cution issued on their judgment. It was sold in subdivisions, 1, 2, 3 and 4, and D. B. Fiske became the purchaser, and received a certificate of purchase. In June, 1875, Hapgood & Co. redeemed sub-lot 4 from said sale, and the certificate of purchase was assigned to said firm. Afterwards, Hapgood & Co. assigned the certificate of purchase to M. E. Henry, and the sheriff conveyed sub-lot 4 to her in October, 1875, and sub-lots 1, 2 and 3 were at the same time conveyed to D. B. Fiske by the sheriff, and, in November thereafter, Fiske conveyed the same to Bassett. A few days thereafter, Bassett quit-claimed sub-lot 2 to M. E. Henry, and she at the same time quit-claimed sub-lots 1 and 3 to Bassett. Afterwards, in November, 1875, all of said sub-lots were sold for delinquent taxes to Bassett, and in 1878 the treasurer conveyed the same to him. Thereafter, Bassett quit-claimed sub-lot 4 to M. E. Henry, and she quit-claimed sub-lot 2 to him. If these several conveyances are regarded as valid against the plaintiff, then, when this action was commenced, M. E. Henry only owned sub-lot 4, and the question is whether it can be subjected to the payment of the plaintiff's judgments. There is no evidence showing bad faith on the part of Bassett, and he must be regarded as a purchaser in good faith and for value of D. B. Fiske. He held the title to sub-lots 1, 2 and 3 under such conveyance, free from equities in favor of the plaintiff. But the contention of the plaintiff's counsel is that M. E. Henry cannot be regarded as such a purchaser, because the whole of lot 1 was conveyed to her in fraud of the rights of the plaintiff; that she had notice of the plaintiff's equities, and therefore cannot be regarded as a purchaser in good faith; and that she is not protected, although she obtained title from Bassett, who was a purchaser in good faith and for value. In support of this proposition, 2 Pom. Eq., § 754, is cited.

Counsel for the plaintiffs reply that the authority cited does not apply, because no actual fraud on the part of either

of the defendants in making such conveyance has been established. It is conceded, however, by counsel that M. E. Henry was a mere volunteer, and that the conveyance to her was void as to existing creditors. To such a party, however, counsel claim that the rule above stated has no application. Counsel for the plaintiffs further contend that the conveyance by the sheriff to M. E. Henry of sub-lot 4 should be regarded as a redemption merely, because it was sold for her debt, which she primarily was liable to pay. It is true that she was the principal debtor on the Fiske judgment, but she was not liable on the Hapgood judgment. To obtain the certificate of purchase, or to redeem from the sale, whichever it may be regarded, required nearly \$400, and we find that the required amount was paid by M. E. Henry. To redeem from the sale under the Fiske judgment did not require more than \$175. But Hapgood was the *bona fide* holder of the certificate of purchase, and to obtain an assignment thereof, or to redeem, M. E. Henry was required to and did pay, as we find from the evidence, about \$225 in addition, to Hapgood, for which she in no respect was liable.

We are unable from the evidence to conclude that M. E. Henry received the conveyance of lot 1 from her father for the purpose of defrauding his creditors. But the title, while it remained in her, was liable to be divested at the instance of existing creditors of her father, because she had paid no consideration therefor. While she held the legal title of sub-lot 4 under the conveyance from the sheriff, said sub-lot was sold for delinquent taxes to Bassett, and he thereafter obtained a treasurer's deed. The validity of the tax title in Bassett is in no manner assailed, and the evidence warrants no other conclusion than that Bassett acted, in procuring such title, adversely to the defendants. When the tax sale was made, M. E. Henry owned the legal title to both sub-lots 2 and 4. When the title became vested in Bassett, she and her father were in possession of sub-lot 2. For the purpose of getting possession of the last-named lot without litiga-

tion, Bassett quit-claimed all his interest in sub-lot 4 to M. E. Henry. As Bassett's title under the tax deed was, valid, and vested in him the absolute title, we think he could convey to M. E. Henry, and she would become vested with a good title, although she may have had notice of the plaintiff's equities, as above stated. She had not been guilty of fraud, but, at most, was a mere volunteer, with notice. 2 Pom. Eq., § 754, and authorities cited in note 2.

AFFIRMED.

THE STATE V. FOOKS.

1. **Criminal Law: FALSE PRETENSE AS TO EXISTING FACT: WHAT IS.**
Where defendant borrowed money on the false pretense that his brother was to arrive with money for him, coupled with a promise to use it in payment of the sums borrowed, this amounted to a pretense that he had the money, *as an existing fact*, and it was properly alleged in the indictment and proved on the trial.
2. ———: **OBTAINING MONEY ON FALSE PRETENSE: INFLUENCE OF THE PRETENSE: INDICTMENT.** An indictment for borrowing money upon a false pretense need not allege that the false pretense was the *sole* cause which induced the complainant to loan him the money. It is sufficient to allege that it was the *main* cause.
3. ———: ———: **PLAUSIBILITY OF PRETENSE.** It is not necessary, in order to sustain a conviction for obtaining money upon a false pretense, that the pretense should be so plausible as to deceive a prudent and intelligent man. It is sufficient to show that it was made with the intention to deceive the victim, and that it did deceive him, though he may have been weak and credulous.
4. ———: ———: **EVIDENCE: ADMISSION BY DEFENDANT OF HIS POVERTY.**
Where defendant, when arraigned upon an indictment for borrowing money upon the false pretense that he was a man of means, stated to the court that he had no means to employ counsel to defend him, and thereby obtained counsel at the expense of the state, his statements so made were admissible in evidence upon the trial to prove the falsity of the pretense made to his victim.
5. ———: ———: **EVIDENCE OF DEVICES.** On the trial of such a case, it is proper to show the arts and devices used by the accused to lead his victim to rely upon the alleged false pretense.

65	196
112	21
65	196
127	418
65	196
128	549

The State v. Fooks.

6. **Instructions: MAY BE IN PRINT.** Instructions given to the jury in print sufficiently comply with the statute which directs that they shall be in writing.
7. **Criminal Law: SPECIAL VERDICT.** There can be no special verdicts in criminal cases. Sections 2806-2809 of the Code, authorizing special findings, relate to civil cases alone.

Appeal from Hardin District Court.

THURSDAY, DECEMBER 4.

DEFENDANT was indicted and convicted of obtaining money upon false pretenses. He now appeals to this court.

Tom H. Milner, for appellant.

Smith McPherson, Attorney-general, for the State.

BECK, J.—I. The indictment charges that defendant, by false and fraudulent representations as to his property and income, induced one Cowham to loan and advance to him certain sums of money. Among other fraudulent representations, it is alleged in the indictment that defendant represented that his brother was soon to arrive in Iowa Falls, and bring with him money for defendant. The evidence supports this allegation, and shows that defendant stated that his brother was an English nobleman. Counsel for defendant insist that the allegation is immaterial, and that evidence in its support was erroneously admitted, for the reason that it pertained to a matter in the future, and not to a present or past event. We think the representation that his brother was to arrive with money, coupled with a promise to use it in payment of the sums borrowed, amounted to a pretense that he had the money. This pretense was properly alleged and proved.

II. The indictment alleges that the false representations were the *main* cause of Cowham's loaning the money to

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obtaining
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defendant. It is insisted that the false pretenses should be alleged to be the *sole* cause thereof; but, to support a conviction, it need not appear that the false pretenses were the only inducement for giving credit or delivering property to the accused. It is sufficient if they had such effect that without their influence upon the mind of the party defrauded he would not have given the credit. *People v. Haynes*, 11 Wend., 557. The indictment alleges that the false pretenses were the means by which defendant obtained the money, thus sufficiently showing that they were the inducements which controlled Cowham in loaning the money.

III. It is argued that the pretenses were absurd, and of such character that a prudent and intelligent man would not
3. — : — :
plausibility
of pretense.

have been deceived thereby. The law will afford protection to the dull, stupid, confiding, and imbecile, against the acts of a cheat. The wise and prudent are not alone protected. If the false pretenses were made with the design of deceiving, and thereby obtaining credit or property, and had that effect, the guilty party cannot escape on the ground of the weak credulity of his victim. See *State v. Montgomery*, 56 Iowa, 195.

IV. At the trial, the defendant being without money or friends, the court appointed counsel to defend him. He stated
4. — : — :
evidence: ad-
mission by
defendant of
his poverty.

in open court that he had no means with which to employ counsel. His statements to this effect were, against his objection, proved, in order to show the fact that he was without money or property. It is now insisted that the evidence was erroneously admitted. We think differently. The defendant's statements were in the nature of solemn declarations, which surely ought to be considered as evidence. It is argued that the statements were made under compulsion, and ought not, therefore, to be admitted in evidence. It cannot be so regarded. Defendant voluntarily made the statement in order to enjoy a benefit which the law mercifully extends to pauper criminals. He

ought not, after receiving the benefits of his statement, to be permitted to defeat justice by withholding it from the jury.

V. Certain letters written by the defendant, addressed to the imaginary English nobleman, his brother, which he cunningly inclosed in a business envelope of his victim, which had a direction for return to the victim, and a letter addressed to the victim by the supposed nobleman, delivered by the defendant himself, were admitted in evidence over defendant's objection. We think they were competent evidence, as they tended to show the devices and arts used to impose upon the person defrauded, and induce him to credit the statements made by the defendant.

VI. Various objections in the nature of criticisms of the instructions given the jury are urged upon our attention. We think the instructions are correct expositions of the law, expressed with reasonable clearness and accuracy.

VII. One instruction is complained of upon the ground that there is no evidence to which it is applicable. We find such evidence, without difficulty, on the record.

VIII. Two or three other instructions were in print, and not in writing. This is made the ground of complaint. The statute, it is true, directs that instructions shall be given in writing. The law is sufficiently complied with by presenting them in print. And, if it should be held that this is erroneous, it cannot be claimed that prejudice resulted therefrom to defendant.

IX. It is urged that the district court erred in not requiring the jury to find specifically upon certain questions of fact involved in the case. The statute authorizing special findings is applicable alone to civil cases. Code, §§ 2806-2809. There can be no special verdicts in criminal cases. The evidence, we find, sufficiently supports the verdict. The foregoing discussion disposes of all questions in the case. The judgment of the district court must be

AFFIRMED.

PARKER V. MIDDLETON.

1. **Procedure: TAKING ISSUE FROM JURY.** Where an issue is made by the answer, and there is some, though slight, evidence to sustain it, it should be submitted to the jury.
2. **Practice: BILL OF EXCEPTIONS: INSTRUCTIONS.** Instructions are a part of the record, and need not be made such by bill of exceptions.
3. ———: **EXCEPTIONS TO INSTRUCTIONS: WHEN TAKEN.** Instructions need not be excepted to when given. It may be done within three days after verdict, in a motion for a new trial. Code, § 2789.

Appeal from Harrison Circuit Court.

THURSDAY, DECEMBER 4.

ACTION to recover specific personal property. The petition states that the defendant had, as sheriff, levied on the property in controversy as the property of one Perry, under an execution against him. Trial by jury, judgment for the plaintiff, and defendant appeals.

H. H. Roadifer, A. W. Clyde and Joe H. Smith, for appellant.

Sims & Cadwell and J. W. Barnhart, for appellee.

SEEVERS, J.—I. The defendant obscurely, but sufficiently, we think, in the absence of a motion for a more specific statement, pleaded that the plaintiff obtained the property in controversy for the purpose of hindering, delaying and defrauding the creditors of Perry. This issue the court failed to submit to the jury, and refused an instruction asked by the defendant, which embodied the theory of the defense. After a careful consideration of the evidence, we think there was some evidence which tends to sustain the issue of fraud. Whether it was sufficient was for the jury to say, and therefore the court erred in failing to submit such question to the

Goodnow v. Wolcott.

jury, and in refusing the instruction asked, or in failing to give one of similar import.

II. Counsel for the appellee insist that the instructions given the jury were not incorporated in and identified by a bill of exceptions. This is not essential. Instructions, when filed, become a part of the record, and may be certified to by the clerk. This has been so often determined that we supposed the rule was well understood by the profession. It is further said that such instructions were not excepted to at the time they were given. It is not essential that this should have been done, because they were excepted to in a motion for a new trial, which was filed within three days after verdict, and the grounds of the objections sufficiently stated in the exceptions. Code, § 2789. The refusal to give the instruction asked was excepted to at the time, as stated in the abstract, and this is not denied. The motion to strike the instructions must be overruled.

REVERSED.

GOODNOW v. WOLOOTT.

SAME v. CHAPMAN.

1. *Goodnow v. Chapman*, 64 Iowa, 802, followed.

Appeals from Webster District Court.

THURSDAY, DECEMBER 4.

George Crane, for appellant.

Theodore Hawley, for appellee.

ROTHROCK, CH. J.—These cases involve substantially the same questions which have been determined by this court in *Goodnow v. Litchfield*, 63 Iowa, 275; *Goodnow v. Stryker*,

62 Id., 221; and in *Goodnow v. Chapman*, 64 Id., 602, and other cases. The only question made in these cases which does not appear to be made in the last of the above cases is that the lands were not taxable for the years 1861 and 1862. In *Goodnow v. Stryker*, *supra*, it was held that the lands were taxable for those years. The same decision and judgment will be entered in these cases as in the case of *Goodnow v. Chapman*, *supra*.

REVERSED.

THE UNIVERSITY OF DES MOINES V. LIVINGSTON, ADM'R.

1. **Evidence: NO PREJUDICE—NO REVERSAL.** The admission of certain evidence in this case, if it was not necessary under the issues, could not have prejudiced appellant, and is, therefore, no ground for a reversal.
2. **Subscription in Aid of College: DEFENSE OF FRAUDULENT REPRESENTATIONS: EVIDENCE.** In an action upon a subscription to the plaintiff university, where the defense is that the subscription was obtained by fraudulent representations, the declarations and statements of plaintiff's president are binding upon it, and are competent evidence of the facts stated by him, so far as they relate to the validity of the subscriptions; but the statements of a mere soliciting agent, made subsequent to the subscription, are not competent on the question of fraud.
3. —: **CONSIDERATION FOR: FACTS CONSTITUTING.** A subscription to a college, for the purpose only of discharging a debt already accrued, is without consideration, and void. But where, in consequence of, and relying upon, a subscription, the college incurs expense and trouble in raising other funds for repairs and endowment, there is a sufficient consideration to sustain the subscription.
4. —: **CONDITION: FAILURE OF: EVIDENCE.** Where one of the conditions of a subscription to a college was that an aggregate of more than \$10,000 should be subscribed by a certain time, and \$13,000 was subscribed, but the defense was that subscriptions had been obtained by fraudulent means and representations, and that there was not an aggregate of \$10,000 of *valid* subscriptions, and the evidence offered by defendant showed, at most, but \$1,000 of invalid subscriptions,—since the burden was on defendant to establish the defense, it was to be presumed that the remaining \$12,000 of the subscriptions was valid,

The University of Des Moines v. Livingston, Adm'r.

and the evidence of the \$1,000 invalid subscriptions, together with the issue to which it related, should have been laid out of the case by a proper instruction.

Appeal from Marion Circuit Court.

THURSDAY, DECEMBER 4.

THIS is an action at law, founded upon a written subscription of \$500, made by T. C. Livingston, deceased, to the plaintiff, the University of Des Moines. There was a trial by jury, which resulted in a verdict and judgment for the defendant. Plaintiff appeals.

C. C. Cole, for appellant.

Bryan & Bryan, for appellee.

ROTHROCK, CH. J.—I. The written subscription which is the foundation of this action is as follows:

"For and in consideration of securing to the Baptist denomination of Iowa the property situate in Des Moines, and known as the 'University of Des Moines,' we, the undersigned, hereby bind ourselves individually to pay the sums set opposite our names, when in the aggregate ten thousand dollars is secured, provided the said amount is pledged by August 1, 1870.

"*Grinnell*, March 20, 1869.

[Signed]

"T. C. LIVINGSTON, \$500."

It is alleged in the petition, or rather in the claim against the estate of Livingston, that more than \$10,000 was secured for the purpose set forth in the subscription on and before August 1, 1870. Upon this statement of the claim the cause was tried in the court below, and a judgment was rendered for the defendant. The plaintiff appealed to this court, and the judgment was reversed. See 57 Iowa, 307.

When the cause was remanded, the plaintiff amended the statement of claim by setting forth, in substance, that, after

securing said subscriptions to the amount of \$10,000 and upwards, the board of trustees accepted the same, and, upon the faith of said subscriptions, and relying upon the payment of the same, made arrangements with the holder of a mortgage against plaintiff's property, for the payment of which said subscription was raised, by which arrangement the holder of the mortgage agreed to discount the same in the sum of \$1,000, upon condition that the balance of his claim should be paid him on or before a certain time; that said trustees made a contract with S. Maria Childs, by which she agreed to furnish the money to take up said mortgage, and to hold the same for the use and benefit of the plaintiff, and thereby save to the college the \$1,000 discount, the said S. Maria Childs knowing of and relying upon said subscriptions, and the promise of the subscribers to pay the same; that plaintiff, relying upon the promise of Livingston and others to pay their subscriptions, was induced to, and did, employ one J. F. Childs and others, at great expense, to raise other and additional subscriptions to furnish and repair the college building, and to solicit subscriptions and raise money as an endowment fund for the plaintiff; and that, relying upon the promise of said Livingston and other subscribers to pay their said subscriptions, the plaintiff raised the sum of \$3,000, and expended the same in finishing its said college building; that plaintiff, relying upon said subscriptions, employed teachers in said college, and incurred a large liability for the payment of their salaries, and raised by subscription the sum of about \$25,000 as an endowment fund for said college; that the persons subscribing for the said sum of \$3,000 and for said endowment were induced to, and did, make and pay their subscriptions, relying upon the promise of said Livingston and other subscribers to pay their subscriptions, and thereby save the said property to the plaintiff, and the sums so subscribed and paid by them; and that, therefore, the subscription of Livingston was founded upon a good and sufficient consideration.

The defendant answered by a denial that there was any consideration for the subscription, and by alleging that, at the time and before Livingston signed said subscription, the plaintiff was indebted in the sum of about \$10,000, and that said subscription was obtained solely for the purpose of raising money to pay said indebtedness, and that neither Livingston nor his estate ever received any consideration whatever for the promise to make said gift. As a further answer and defense, it was alleged that enough of the subscriptions taken to pay off said indebtedness to reduce the amount of the valid subscriptions below \$10,000 were made by persons not able to pay, and were secured by false and fraudulent representations of the plaintiff's agents engaged in procuring said subscriptions, to the effect that the Baptist church, owning and controlling the university and similar institutions, at Pella and Burlington, Iowa, had decided to abandon the colleges at Pella and Burlington, and concentrate all their college capital and influence in the university at Des Moines; that in truth no such intention on the part of the Baptist denomination had been formed, nor any such decision made, as said agents well knew at the time; that by their representations a large number of subscribers, who believed them to be true, were induced to sign said subscriptions; that, by reason of the premises, said subscriptions were void, and the said subscribers refused to and never did pay the same, and they are now barred by the statute of limitations; that by reason of the aforesaid facts the said subscription never had \$10,000 of collectible subscriptions pledged thereto, and by reason thereof was never binding on Livingston or on his estate. As a further defense, it was alleged that said false and fraudulent representations were made to Livingston, and that by reason thereof he was induced to make his subscription, and that, the same having been obtained from him by fraud, he was not at any time liable thereon.

The court determined that, upon the issues, the burden of

proof was on the defendant, and his evidence was first introduced. He first offered an abstract of title, ^{1. EVIDENCE:} showing that the Des Moines University acquired the legal title to its site and property in the month of November, 1865. This evidence was objected to by plaintiff as irrelevant and immaterial. The objection was overruled, and the evidence admitted. This is the first ground of complaint made by appellant's counsel. It will be observed that by the written subscription the amount subscribed was in consideration of "securing" the property known as the "University of Des Moines" to the Baptist denomination of Iowa. Now, while it is impliedly conceded by the amended petition, and expressly averred in the answer, that the subscription was for the purpose of securing the property by paying off and discharging the mortgage upon it, and not for the purpose of securing it by purchase, we think there was no error in admitting evidence of title. It may have been unnecessary, but we cannot see that it worked any possible prejudice to plaintiff. The same may be said of the oral testimony introduced to show that the subscription was taken to pay debts previously contracted.

II. Next, it is claimed that the court erred in admitting the testimony of Delos Arnold, who was one of the persons who signed the subscription. His testimony related to the issue made by the answer, that subscriptions other than that of Livingston were obtained by fraudulent representations. It is urged that his testimony did not show that any fraudulent representations were made to him. We think that the objection would be well taken if it were not for the appellee's abstract. It appears therefrom that the witness did testify to the representations substantially as alleged in the answer. Other objections were made to the testimony of Arnold and of other witnesses. It appears from appellee's abstract that some of the evidence objected to was ruled out and taken from the jury. We need not discuss the rulings upon the evidence further than we have. There are other

errors in the record which, in our opinion, demand a reversal of the judgment of the court below, and, in leaving this branch of the case, we will say, in view of a new trial, that any evidence of fraudulent representations to procure subscriptions is competent under the issues, and the declarations and statements of the president of the institution are binding upon it, and are competent evidence of the facts stated by him, so far as they relate to the validity of the subscriptions. It is also very plain that the declarations of a mere soliciting agent of the plaintiff, made after the subscription was made, are not competent upon the question of fraud.

III. The appellee insists that the subscription, being a mere gift to discharge an indebtedness already accrued, was without consideration, and void. Upon the former appeal it was held that such a subscription was without consideration. But it was also held that "if the plaintiff, in consequence of, and relying upon, the subscription in question, incurred the expense and trouble of raising \$3,000, and of expending it upon the college building, this would, under the authorities, constitute a consideration sufficient to support the subscription." And the judgment was reversed, because the court excluded evidence of procuring the additional subscription of \$3,000 and expending it upon the building. We have no disposition to question the correctness of the ruling upon the former appeal. The evidence on the last trial shows that, after the subscription to pay the debts was raised upon the faith that thereby the property would be saved and secured to the university, large amounts were raised for repairs and expended for that purpose, and that an endowment fund was in like manner raised. We think that, under the authorities cited in the opinion on the former appeal, a sufficient consideration for the subscription in controversy was shown.

IV. It also appeared in evidence in the last trial that

2. SUBSCRIPTION in aid of college: defense of fraudulent representations: evidence.

3. ———: consideration for facts constituting.

about \$13,000 was subscribed upon the subscription, part of which is now in controversy. There is no conflict in the evidence as to this fact. The aggregate amount of the subscriptions was about \$13,000. The defendant, as has been seen, claimed that part of the subscriptions were made by persons not able to pay, and part was obtained by the false representations above set out, and that, by reason thereof, the subscription was never binding on the decedent or on his estate. Upon this issue, the court instructed the jury as follows: "(5) If you find from the preponderance of the evidence that, by reason of some part of the subscription having been procured by fraudulent representations, and some part of it being worthless when taken and accepted, with knowledge of its worthless character, and solely to enable the plaintiff to collect such of the subscription as was good, including that sued on, there was not \$10,000 of good and valid subscription secured and pledged by August 1, 1870, and that \$10,000 thereof has not been paid, your verdict will be for the defendant, without regard to what may have been done, if anything, by the plaintiff, in reliance upon the subscription. This defense will not, however, avail the defendant, if the decedent gave the subscription with knowledge of the wrongs on the plaintiff's part." This instruction should not have been given. The burden of proof was upon defendant, under the issues, to show that there was not \$10,000 of valid subscriptions. This fact was not shown. It is true that Arnold and Day were called as witnesses to prove that their subscriptions were invalid by reason of fraudulent representations. But this was not enough. Their subscriptions were \$500 each, and, if they should be deducted from the aggregate, the sum of \$12,000 still remains as presumably valid and collectible. Instead of giving this instruction, the jury should have been directed to disregard the testimony of Arnold and Day, so far as it tended to show that their subscriptions were obtained by fraud. They should have been directed that, as there was

4. —: con-
dition: fall-
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no proof to sustain that defense, the issue made thereupon was out of the case, and that they should confine their deliberations to the other issues raised by the pleadings. For the error in giving this instruction, the judgment of the circuit court will be

REVERSED.

BECK, J., took no part in the decision of this case.

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65	209
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 PARK V. THE INDEPENDENT SCHOOL DIST. NO. 1, PLEASANT GROVE TWP., DES MOINES COUNTY.

1. **Public School: DISCHARGE OF TEACHER: APPEAL TO COUNTY AND STATE SUPERINTENDENTS: ACTION FOR DAMAGES: RES ADJUDICATA: EVIDENCE.** Where a school-teacher, alleging that he had been discharged by the directors of the district, and that his discharge was unlawful, appealed to the county superintendent, who found that he had been unlawfully discharged, which finding was affirmed upon an appeal taken to the superintendent of public instruction; and he afterwards brought his action against the district to recover the damages resulting to him from the wrongful discharge, *held*, in such action, that, as to the fact of the discharge, and the wrongful character thereof, the finding of the state superintendent was final and conclusive upon the parties, and that evidence offered by the district to prove that the teacher had resigned, and had not been discharged, was incompetent.
2. ———: **WRONGFUL DISCHARGE OF TEACHER: MEASURE OF DAMAGES.** In such case, if the teacher held himself in readiness, during the pendency of the appeal to the superintendent of public instruction, to perform his contract, and was not able to obtain other employment during that time, he was entitled to recover the wages provided for in the contract during that period. But, after the final decision of the superintendent of public instruction in his favor, it was his duty, not only to be ready to perform, but actually to perform, or offer to perform, the services provided for in the contract for the remainder of the term, and, without such performance or offer, he could not recover his wages after such final decision.

Appeal from Des Moines District Court.

THURSDAY, DECEMBER 4.

PLAINTIFF alleges in his petition that in the month of
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September, 1882, he entered into a contract with defendant to teach its school for a term of 34 weeks, for which service defendant agreed to pay him at the rate of \$45 per month; that he entered upon the performance of his duties under said contract on the fourth of September, and continued therein until the eighteenth of that month, when the defendant's board of directors wrongfully and illegally discharged him, and refused to permit him to further perform said contract; that he thereupon appealed from the order of said board to the county superintendent, and upon the hearing of said appeal the action of the board of directors was reversed; that the defendant then took an appeal to the superintendent of public instruction, who, upon a hearing, affirmed the action of the county superintendent, and he alleges that, in consequence of the illegal act of the defendant in refusing to permit him to perform said contract, he lost the greater portion of the time covered by it, being unable to procure other employment, and he asks damages therefor. Defendant denies that it wrongfully or illegally terminated said contract, or refused to permit plaintiff to perform the same, and alleges that he resigned his position as teacher of said school, and refused to continue in said employment. There was a verdict and judgment for plaintiff, and defendant appeals.

Hall & Huston, for appellant.

J. T. Illick, for appellee.

REED, J.—The evidence given on the trial shows that, on the morning of the eighteenth of September, the members of defendant's board of directors appeared at the school house, and informed plaintiff of certain rumors affecting his character and conduct as a teacher, which were current in the district. No formal action was taken at that time, but in the afternoon of the same day the members of the board came together again at the school house, and in plaintiff's presence examined some of the pupils of the school touching the sub-

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ject of said rumors. The result of this meeting was that plaintiff ceased to teach the school, and the chief question of controversy between the parties is as to what action was taken at that time.

Plaintiff's claim is that the board of directors then assumed to discharge him, while defendant's claim is that he tendered his resignation, and that the only action of the board of directors was to accept the same. Within the time provided by section 1829 of the Code for taking appeals from decisions or orders of the board, plaintiff filed his affidavit with the county superintendent, setting forth the fact of his employment to teach said school, and alleging that he had been discharged from said employment by the board of directors without any just reason, and without a full, fair, and impartial investigation of the case, and without being permitted to make any defense. The county superintendent gave notice of the appeal to the secretary of the board of directors, as required by section 1832 of the Code, and fixed a time for the hearing thereof. The secretary filed with the superintendent what purported to be a transcript of the record of the meeting of the board on the eighteenth of September. This paper recited that plaintiff on that day tendered his resignation as teacher of said school, and that the same was accepted by the board, but it did not have attached to it the certificate of the secretary that it was a correct transcript of the record, or that it correctly stated the action of the board on the occasion in question. On the hearing of the case, the superintendent rejected this paper as evidence of what had been done, on the ground that it was not properly authenticated, and permitted the parties to introduce parol evidence on the question; and on the evidence before him he found that the board had discharged plaintiff, and that its action in doing so was irregular, in that he had not been accorded a legal hearing; and he made an order reversing its action.

I. On the trial in the district court, plaintiff was permitted, against defendant's objection, to introduce in evidence the

1. PUBLIC
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dence.

record of the order made by the county superintendent on the hearing of the appeal. Defendant offered in evidence the record of the meeting of the board of directors on the eighteenth of September. It also offered parol evidence tending to prove that plaintiff was not discharged from said school, but that he resigned, and his resignation was accepted by the board of directors; but, on plaintiff's objection, all this evidence was excluded, and the court instructed the jury "that the record of the proceedings before the county superintendent was conclusive upon defendant, and that it determines that plaintiff's discharge was wrongful and illegal." These several rulings constitute the ground of the first assignment of error argued by counsel. The position urged by counsel is that the board of directors, in investigating a charge or complaint against a teacher, and in discharging him from his employment thereon, and the county superintendent, in reviewing their action on appeal, act in a ministerial capacity, and hence their action is not conclusive of the rights of the parties when they become the subjects of inquiry in the ordinary tribunals, but the courts may go behind their orders and decisions, and determine them according to their merits. But, in our opinion, this position cannot be maintained.

It is provided in section 1734 of the Code that, "in case a teacher employed in any of the schools of the district is found to be incompetent, or is guilty of partiality or dereliction in the discharge of his duties, or for any other sufficient cause shown, the board of directors may, after a full and fair investigation of the facts of the case, at a meeting convened for the purpose, at which the teacher shall be permitted to be present and make his defense, discharge him." It is also provided by section 1829 that "any person aggrieved by any decision or order of the district board of directors, in matter of law or of fact, may appeal therefrom to the county superintendent." Section 1834 provides that upon the hearing of such appeal

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the superintendent "shall make such decision as may be just and equitable, which shall be final, unless appealed from." And section 1835 provides for an appeal from the decision of the county superintendent to the superintendent of public instruction, whose decision, when made, shall be final. We think it manifest that the intention of the legislature in enacting these sections was to provide a speedy and inexpensive mode for the determination of such questions as might arise in cases wherein it is sought to discharge teachers in the public schools from their employment. And we think it equally clear that it was the intention, also, that the parties should be concluded, as to the questions involved in the controversy, by the decision which should be finally made in the proceeding. This conclusion results, necessarily, we think, from the language of the section quoted above, and is consistent with the holding of this court in the cases of *Smith v. District Twp. of Knox*, 42 Iowa, 522, and *Kirkpatrick v. Ind. Dist. of Liberty*, 53 Id., 585, in each of which it is held that the power and duty imposed on the board of directors by section 1734 partakes of a judicial character, and that the teacher who has been discharged by the board has no remedy in the courts, until it has been determined, on an appeal from the order of the board, that such discharge was wrongful or unlawful. As the county superintendent had no competent record evidence before him of the action of the board of directors, it was competent for him to hear the parol evidence offered by the parties, and determine from it what action had in fact been taken. And the holding of the district court, that his decision of the questions presented by the appeal was conclusive of the rights of the parties as to those questions, and that the parol and documentary evidence offered by the defendant on the trial to impeach the decision was incompetent, was clearly right.

II. Defendant asked the court to instruct the jury that, upon the decision of the appeal by the county superintendent,

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2. ———; wrongful discharge of teacher: measure of damages. plaintiff had the right at once to take charge of the school, and proceed to perform the unexpired portion of his contract, and that the appeal to the superintendent of public instruction did not supersede or suspend the decision of the county superintendent; and that, if the plaintiff failed to return and take charge of the school when the decision of the county superintendent was made, or did not offer to do so, he could not recover anything on the contract after that date. The court refused to give these instructions, but told the jury, in effect, that, if plaintiff held himself in readiness during the pending of the appeal to the superintendent of public instruction to perform the contract, and was not able to obtain other employment during that time, he was entitled to recover the wages provided for in the contract for that period. We think this holding is correct. If the order of the board of directors had been affirmed by the decision of the superintendent of public instruction, it would have had effect from the time it was made. Plaintiff's discharge from the employment in that case would have dated from the eighteenth of September, and the contract between the parties would have been terminated from that date; and, for any services he might have rendered after that date, defendant would have been under no contract obligation to pay. As defendant was seeking, by the appeal, to have the validity of the order of discharge established, and, if successful, the order would be effective from its date, plaintiff could not be required to go on performing the contract while the question remained undetermined.

III. It was proved on the trial that plaintiff found employment as a teacher during four months of the time covered by the contract, and that he earned \$175 in such employment. By the verdict and judgment he is awarded the contract price for his services during the whole period covered by the contract, less the amount so earned. One of the grounds of the motion for a new trial is that this amount is excessive, and we think that on this

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ground the verdict should have been set aside, or plaintiff should have been required to remit a portion of the damages. The decision of the superintendent of public instruction was rendered on the sixteenth of February, 1883. About one-half of the term covered by the contract had then expired. The decision determined finally that the order of discharge was illegal and wrongful. The controversy was then at an end. The order of discharge was declared invalid, and it was set aside. It then presented no obstacle to the performance by plaintiff of the remaining portion of the contract, and he would not be entitled to recover the wages then unearned, without performing, or offering to perform, the remainder of the services provided for in the contract. At that time he was out of the district. He did not return to it, or make any offer to teach the remainder of the term, farther than to write to the president of the board, informing him that he was ready to go on and teach the balance of the term, to which the president made no answer. On this state of facts, we are clear that he is not entitled to recover for the then unexpired portion of the term. The only thing which had stood as an obstacle to the performance by him of the contract was the order of discharge, and, as that was then at an end, he might have gone on and taught the remainder of the term under the contract with defendant, which was then in full force. The judgment of the district court will, therefore, be reversed, and the cause will be remanded for further proceedings in harmony with this opinion.

REVERSED.

HAINES V. THE ST. LOUIS, DES MOINES & NORTHERN R'Y CO.

1. **Railroads: RIGHT OF WAY: VILLAGE AND FARM LAND ADJOINING: DAMAGES.** Where plaintiff owned a tract of land, partly within and partly without the limits of a city, and a part of the land was adapted to cultivation only, and another part was adapted for use as suburban residence property, and the defendant condemned a right of way for its road across that portion of the land adapted to suburban residences, and plaintiff appealed to the circuit court, where she claimed that the portion of the tract crossed by the railroad was specially valuable, not as farm land, but as property suitable for suburban residences, *held* that, since, on her own theory, the two portions of the tract were adapted to different uses, and were, in effect, devoted to different objects, they could not be regarded as constituting one property, and that she could not recover for damage to the whole tract, but only for the damages resulting to that portion of the tract which was shown to be adapted to suburban residences. BECK, J., *dissenting*.

Appeal from Warren Circuit Court.

FRIDAY, DECEMBER 5.

THIS is an *ad quod damnum* proceeding, instituted by defendant, for the condemnation of a right of way for its railroad across certain premises belonging to plaintiff. There was an appeal by plaintiff from the award of damages made by the commissioners appointed by the sheriff. The jury in the circuit court assessed plaintiff's damages at \$2,200, and the court entered judgment on this assessment. Defendant appeals.

Parsons & Runnells, for appellant.

William Phillips, for appellee.

REED, J.—The tract of land across which defendant seeks by this proceeding to condemn a right of way is situated about two miles west of the city of Des Moines. A portion of it is within the incorporated town of Greenwood Park, (which is a subdivision of the city,) and the balance is imme-

diately south of said town. The tract consists of sixty or sixty-five acres. Before defendant constructed its road, two other railroads were constructed through the tract, running east and west through it. These roads are parallel with each other, and their rights of way join. Defendant's road runs in the same general direction with the others, and there is a strip of land about eight rods wide between the portion which it seeks to condemn and the right of way of the road lying next to it. About sixteen acres of the tract is south of the other two railroads. This land is what is called bottom land. It is in cultivation, and is farm land, and well adapted to gardening. Plaintiff's dwelling-house and other buildings are situated north of the two roads first constructed, and there is an orchard and vineyard and grove of walnut timber on this portion of the tract. Defendant's road is constructed through this tract. The right of way will occupy about five and one-half acres, and will include portions of the orchard and grove, and some of the trees were removed in the grading of the road. About ten acres of this tract is separated from the remainder by a public highway which runs through the premises. This ten acres is mostly timber or brush land, and is quite broken, and but a small portion of it has been cultivated; but it is inclosed with a fence, and has been used for pasture. The remainder of the tract north of the roads first constructed is also rolling land; but, with the exception of the portion occupied by the buildings and yards, and the orchard and grove, it is in cultivation. All of the land north of said railroads was capable, before defendant's road was constructed, of being subdivided and used for suburban residence property; and the evidence tends to show that there was a demand for that character of property, and that the tract was much more valuable because of its character in that respect, and of this demand, than it would be for agricultural or gardening purposes. The portion south of the railroads was not adapted to any use except farming and gardening, and it had no value except for those purposes.

On the trial, plaintiff was permitted, against defendant's objection, to introduce evidence tending to prove the extent to which the tract, as a whole, was depreciated in value by the appropriation of the right of way, and the jury were told in an instruction, in effect, that they should estimate plaintiff's damages with reference to the effect of the appropriation of the right of way on the value of the whole premises. These rulings are assigned as error. If the whole premises constituted a farm, and were improved and used as such, and had no value above that of farm land by reason of its adaptability to any other use, the rule adopted by the circuit court would probably be the correct rule for ascertaining plaintiff's damages. But plaintiff did not seek to recover on the theory that the premises were simply a farm, or that they were valuable simply as farm land, and she was careful to prove that that portion lying north of the roads first built was specially valuable because of its adaptability to another use, and that the appropriation by defendant of its right of way through it had greatly impaired its value for that use.

We are of the opinion that, on plaintiff's theory as to the use to which the portion of the land through which defendant's road is built is adapted, and its special value because of its adaptability to that use, she is not entitled to have the effect of the appropriation of the right of way on the value of the agricultural land lying south of the railroads considered in the assessment of her damages. If a person owns village property and farm lands adjoining, and a portion of the village property is appropriated by a railroad company for right of way, it would hardly be contended that he is entitled to have the injurious effect which the construction of the railroad might have on the value of the farm lands considered and compensated for in the assessment of his damages because of the appropriation of the village property. But this is what, in effect, was done in this case. True, the premises are now used and cultivated as a farm, but plaintiff does not seek to recover on the theory that the portion through which the

appropriation was made is farm land; but her claim is that it is, in fact, suburban residence property, and that it is specially valuable because of its character in that respect; and she asks to be compensated for the depreciation of its value as such property in consequence of the appropriation of the right of way through it. The different portions of the property being adapted to different uses, and being, in effect, devoted to different objects, they cannot, we think, be regarded as constituting one property. If the farm land lying south of the railroads was injuriously affected by the construction of the road through the suburban property, the injury thereto is one which the plaintiff shares in common with other owners of land whose property is similarly situated. As no portion of that property is appropriated for the right of way, the law gives her no remedy for such injury.

Defendant insists that the "timber" or "brush" land ought not to be considered in connection with the other portion of the tract lying north of the railroads, in assessing the damages. But we think otherwise. The portion of the tract lying north of said railroads was all adapted to one use, and was all specially valuable because of its adaptability to that use, and was all injuriously affected by the appropriation of the right of way through it, and we think it should be treated as constituting but one property, and should be considered as such in assessing the damages. Other questions are argued by counsel, but the rulings we have considered constitute the only errors presented by the record.

REVERSED.

BECK, J., *dissenting*.

PENNYBACKER v. LEARY.

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1. **Statute of Frauds: CONTRACT FOR PARTNERSHIP TO BUY AND SELL LANDS.** A parol agreement for the creation of a partnership for the purpose of buying and selling certain lands, is not an agreement for the transfer of the title to lands, and is not within the statute of frauds. *Richards v. Grinnell*, 63 Iowa, 44, followed.
 2. **Partition: OF LANDS OWNED BY FIRM: FACTS NOT ENTITLING TO.** Where plaintiff and defendant entered into a partnership for the purchase and sale of certain lands with defendant's money,—plaintiff's services being put against the use of defendant's money, with the understanding that, upon the sale of the lands, defendant should be reimbursed for the money advanced, with interest, and that the profits of the venture should be divided, and the lands were purchased accordingly in defendant's name, *held* that plaintiff was entitled to no part of the lands or profits until a final settlement of the partnership, and that an action brought by him for a partition of the lands was properly dismissed.

Appeal from Woodbury Circuit Court.

FRIDAY, DECEMBER 5.

ACTION IN CHANCERY. Upon a trial on the merits, plaintiff's petition was dismissed. He now appeals to this court.

J. H. & C. M. Swan, for appellant.

Joy, Wright & Hudson, for appellee.

BECK, J.—I. The petition alleges that the parties entered into a parol contract of partnership for the purchase and sale of certain tracts of land, containing together 400 acres; that, in pursuance of this contract, the lands were purchased, and the title conveyed to defendant, and that thereby they each became the owner of an undivided one-half thereof. The special relief prayed for is that the interest of the parties be confirmed, and that the lands be partitioned accordingly. The petition also asks for general relief. The answer of the defendant denies the contract of partnership, and the interest

claimed by plaintiff in the lands. Other allegations of the pleadings need not be recited here.

II. The preponderance of the evidence establishes that the parties did enter into a contract for the purchase of the land, whereby they were to share in the profits and losses of the transaction. By the terms of the agreement, plaintiff was to purchase the lands in defendant's name, who should advance the whole of the purchase money, and be allowed interest thereon at the rate of 10 per cent per annum. The lands, or the profits remaining, after deducting from the proceeds of the sale of the land the purchase money, interest thereon, and taxes, were to be divided equally. Plaintiff's services in the purchase of the lands were put against the money for the purchase, furnished by defendant upon the terms just indicated. Plaintiff, in his own testimony, states the contract and transaction to this effect. Defendant contradicts this evidence, and denies that any such contract was made. But plaintiff's testimony is strongly and directly corroborated by two witnesses, who either were present when the contract was made, or heard defendant admit it substantially in the form testified to by plaintiff. This oral contract must be regarded as established by the preponderance of the evidence.

III. But defendant insists, and pleads as a defense in his answer, that, as the contract was for the purchase of an interest in lands, and was wholly oral, it cannot be enforced under the statute of frauds. The contract, to be truly stated, amounted to a parol agreement for the creation of a partnership, the object of which was to acquire and sell certain lands. The part of the agreement obligating the parties to purchase the land was but an incident of the contract of partnership. It provided for the subject and manner of investment of the capital of the firm. It was simply an agreement that the firm would buy the lands. By this agreement neither party bought or sold lands. It was not an agreement for the pur-

1. STATUTE of
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chase and sale of lands. It was nothing more than an agreement that the firm should buy lands of another, which should be held as firm property. It was not, therefore, an agreement or contract under which an interest in or title to lands was attempted to be transferred. It simply provides what interest the parties shall have therein, when the lands shall be acquired, as provided by the contract. Surely, if two persons agree to enter into a partnership for the purchase and sale of dry goods, and therein specify the manner of the contribution of the capital of the firm, and the goods to be purchased therewith, and the persons of whom they shall be purchased, the contract could not be regarded as creating or transferring any property or interest in the goods intended to be purchased. There is no distinction in principle between that case and this. We conclude that the contract in question is not within the contemplation of our statute of frauds, which provides that no evidence of a contract "for the creation or transfer of any interest in lands, except leases for a term not exceeding one year," is competent, "unless it be in writing, and signed by the party to be charged, or by his lawfully authorized agent." Code, § 3663.

The rule which we recognize is applied and illustrated in *Richards v. Grinnell*, 63 Iowa, 44; *Bannon v. Bean*, 9 Iowa, 395; *Cooley v. Osborne*, 50 Iowa, 526. See, also, *Carr v. Leavitt*, 54 Mich., 540. In *Richards v. Grinnell* it was held that a contract to enter into a partnership for the purpose of buying and selling lands is not within the statute of frauds. Many of the authorities referred to by counsel in this case are cited and considered in the opinion. That case is not distinguishable in its facts from this. Practically, the only difference consists in the fact that in this case the oral contract of partnership contemplates the acquisition by the firm of certain specified tracts of land; in that case the quantity and precise description were not specified, though their locality was. This difference does not require the application of other or different principles of law to the respective cases.

IV. It will be observed that the lands, as we have before stated, were not purchased by the contract for the co-partnership, but by a subsequent purchase made in pursuance thereof. The case, then, assumes the aspect of the purchase of lands by a co-partnership. While the title of the lands was, under this purchase, vested in defendant, they were really held by him in trust as partnership property. Plaintiff's interest in the lands is that of a partner, as prescribed by the contract of co-partnership. It is plain that plaintiff is not entitled to a partition of the lands, as he specially prays in his petition. Defendant furnished the money to purchase the lands, and, under the contract of co-partnership, he is to be allowed a return thereof, with 10 per centum interest. After the sale of the lands and the repayment of the sum he advanced, with interest and taxes, the lands or the profits, if a sale shall be made, are to be divided between the parties. Plaintiff is entitled to no part of the lands or profits until defendant be paid and the partnership settled. It is not made to appear that plaintiff is entitled now to enforce a sale of the lands and the final settlement of the partnership, if such relief could be granted under the general prayer of his petition. He is surely not entitled to a partition of the lands, for which he specially prays. We therefore think that his petition ought to be dismissed, but he ought not to be precluded from seeking in a proper action the settlement of the partnership, and the recovery of his interest as a partner in the lands, or the profits thereof, whenever he may be able to establish his right to enforce such a settlement of the partnership. The petition is therefore dismissed, without prejudice to such an action.

AFFIRMED.

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KOONTZ V. THE CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.

1. **Railroads: DILIGENCE REQUIRED OF: BRAKEMAN FALLING THROUGH BRIDGE.** Railroad companies, in providing for the safety of their employes, are not required to anticipate and guard against every possible danger, but only such as are likely to occur. And, while it may be anticipated that trains will have to be stopped in certain emergencies at unusual places, and that employes will be required to go upon the track at such places, yet it cannot be anticipated at *what* places such emergencies will arise; and the company is not required, in view thereof, to have its whole track so guarded as to prevent accidents to employes in such emergencies. Such hazards pertain to the nature of the business, and are assumed by the employee. So *held* in this case, where defendant's train was stopped, in the night time, at an unusual place, on a bridge in process of repair, and plaintiff's intestate, a brakeman, in passing along the track, in the performance of his duty, stepped through the bridge and was killed.

Appeal from Johnson Circuit Court.

FRIDAY, DECEMBER 5.

JOHN S. KOONTZ was in the employ of the defendant as a brakeman on a freight train, and fell from a bridge and was killed. The plaintiff is administrator of his estate, and seeks to recover damages caused by the death of the deceased. On motion, the court directed the jury to find for the defendant, which they did, and the plaintiff appeals.

C. S. Ranck, S. M. Finch and S. H. Fairall, for appellant.

Boal & Jackson and T. S. Wright, for appellee.

SEEVERS, J.—A short distance west of Iowa City the defendant constructed a bridge, which formed a portion of its track. At the time of the accident the defendant was engaged in repairing the bridge, or rather was at that time replacing the old with a new bridge. The old bridge, or portions of it, had been taken away, but trains continued to pass over it as previously, except that they were run at a less

rate of speed. The accident occurred about 9 o'clock at night. The train was stopped on the bridge because the engineer supposed some of the cars were off the track, or one of the brakes was set. The deceased was riding in the cab with the engineer or fireman, and when the train stopped the fireman picked up a lantern and got down for the purpose of seeing what was the matter, and the deceased also did the same thing, but he did not have any lantern. When the deceased was next seen he was lying at the base of an abutment of the bridge, greatly injured, and because of such injuries he in a few days thereafter died. The deceased must have passed on the grade alongside the cars for a short distance, and stepped off the abutment through an opening in the bridge. There is no evidence tending to show that trains usually stopped on the bridge, or where this one did, for any purpose which required an employe to get down from the train on the track or bridge. The plaintiff claims to be entitled to recover because the bridge was "in an unsafe and dangerous condition for the employes of the defendant, whose duty it was to go upon the same." There was evidence tending to show that, when there is anything the matter with the train which causes it to be stopped, it is the duty of the brakeman to ascertain what the matter is, and in the performance of his duty he may get down on the track and walk alongside of the cars.

One material question discussed by counsel is whether the defendant was negligent in permitting the bridge to be in the condition it was. In determining this question it will be assumed that, but for the repairs being, made the accident would not have occurred,—that is, that the old bridge was so constructed with planks laid over the same that the deceased would not have fallen; but there was no evidence tending to show that he had knowledge that such was the case, or could possibly have so supposed. Bridges and railway tracks must be repaired, and in doing so ordinary care must be exercised. What probably will occur should be anticipated and guarded against. The bridge in question was sufficient for trains to

pass over it with safety. For this purpose due care did not require that the bridge should be planked. If, however, it was necessary for employes to pass over the bridge in the performance of their duties, ordinary care would seem to require that barriers should be erected, or other precautions against accident used; the rule being, as we understand, when employes are required to use appliances in the performance of their duties, that such appliances should be kept in suitable repair, and be reasonably sufficient for the purpose intended. Several authorities are cited in support of this proposition, and we do not understand the rule to be controverted by counsel for the defendant. Their contention is that it could not be anticipated that something would occur which would render it necessary to stop the train at the place it did, and that it would be necessary for an employe to pass along the track, and over the bridge, for the purpose of ascertaining what was the matter; and we think this is so. If this is not true, then every bridge must be planked, or otherwise guarded, and barriers must be erected at every cattle-guard; for it is impossible to tell where it may become necessary or prudent for a train to be stopped, and an employe required, in the performance of his duty, to pass alongside of the train for some necessary purpose. There is no evidence tending to show that this bridge is an exception to those constructed at other places on the line of the road. Ordinarily, it is not expected that employes will be required to walk across bridges, and they are not ordinarily constructed so that this can be done with entire safety; at least, during the nighttime.

Ordinary care does not require that every possible contingency must be anticipated and guarded against, but only such as are likely to occur. That a railroad company should anticipate that a train may, for some necessary purpose, be stopped at a place other than the usual stopping-places, is possibly true; but at what place cannot be anticipated, and therefore they, in the exercise of ordinary diligence, are not

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required, as we have said, to plank every bridge or cattle-guard, and have the whole track so guarded as to prevent accident to employes. The hazardous nature of the business is such that accidents occur for which the company is not responsible; and this is one of them. In support of the foregoing views, analogous cases might be cited. The facts, however, in such cases not being like those in the present case, we are content to base our conclusion on principle.

It is said that the court erred in not submitting the question of negligence to the jury, but, as there is no dispute as to the facts above stated, we think it was for the court to determine such question as a matter of law.

AFFIRMED.

HILLYER V. FARNEMAN ET AL.

VAN GORDER, ADM'R, V. HILLYER ET AL.

- 1. Tax Sale and Deed:** PUBLISHED NOTICE TO REDEEM: TO WHOM DIRECTED. Where land has been sold for taxes, and, when the notice to redeem is given, it is taxed by mistake in a wrong name, and the notice is given by publication only, it must be directed to the person in whose name the land is taxed. If addressed to another, though that other be the real owner, a tax deed issued pursuant thereto will be invalid.

Appeals from Audubon District Court.

FRIDAY, DECEMBER 5.

THESE cases are submitted together as involving the same question of law. The question presented is as to the validity of certain tax deeds. The plaintiff, Sarah J. Hillyer, holds under the tax deeds, and the first action is brought by her to quiet title against Isaac Farneman and Cornelius Conover, as claiming to hold under the patent title. H. E. Long

65	227
83	21
65	227
86	136
65	227
92	104
65	227
97	246
97	263
65	227
115	568
65	227
117	60
65	227
130	292

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intervened as a purchaser from Conover. The second is brought by Charles Van Gorder, administrator, to foreclose a mortgage executed upon the land by Sarah J. Hillyer. To that she was made defendant as mortgagor, and Isaac Farneman, Cornelius Conover and H. E. Long were made defendants, as claiming some interest in the land. A decree was entered in the first case sustaining the tax deeds and quieting the plaintiff's title, and in the second case foreclosing the mortgage as against all the defendants. Farneman, Conover and Long appeal in both cases.

H. E. Long, for appellants.

Hanna & Matthews and *Holmes, Nash & Phelps*, for appellees.

ADAMS, J.—The tax deeds are assailed upon several grounds, but it will be necessary to consider but one, and that is the alleged insufficiency of the expiration notice. The notice was given by publication, and ran to Isaac Farneman and Cornelius Conover, who were at that time the owners of the land. It appears, however, that the land was taxed in the name of "Farnum & Conover." Whether there was a person by the name of Farnum, to whom it was designed to tax the land, does not appear; but it seems not improbable that the name of Farnum was used by mistake for Farneman. This theory would be as favorable as any for the appellees, and we shall treat the case as if such was the fact. We have the question, then, whether, if land is taxed by mistake in a wrong name, and the expiration notice is given only by publication, the published name should be that of the owner, or that in which the land is taxed. In our opinion it should be that in which the land is taxed.

While it is true that the object is to give actual notice, if possible, to the owner, the statute does not require notice of any kind to be given to him. In many cases it would be difficult for the holder of the certificate to discover the

Hillyer v. Farneman et al. Van Gorder, Adm'r, v. Hillyer et al.

owner, and in some cases, doubtless, impossible. The legislature, therefore, very properly provided that notice should be given to the person in whose name the land is taxed. Code, § 894. Where the land is taxed in any name, the duty of the certificate-holder, as we view it, is definite and certain, and easily performed. Any ruling which should render it uncertain would only lead to mistakes, and that, too, in a matter in which it is of the gravest importance that there should be no mistakes. Possibly, if actual service should be made upon the owner, he should not be heard to complain, however deficient the service might be in other respects; but we do not wish to be understood as intimating an opinion that he should not. It would be a grave question as to whether the courts could sanction a substituted notice on the ground that it is as good as or better than that provided by statute. But the notice in question was given by publication. At best, it was only constructive notice, and we think that it should have conformed to the statute by running nominally to the person in whose name the land was taxed. If it had so run, it would, unquestionably, have been good. But we cannot hold that a published notice running to the owner would also be good, without holding that the notice may run either to the person in whose name the land is taxed or to the owner; and, if the notice does not run to the person in whose name the land is taxed, but to some one else, that the treasurer, when called upon to execute a deed, must either determine whether the person to whom it runs is the owner, or execute the deed upon mere demand. If A. B.'s land is taxed in the name of C. D., and the expiration notice is given by publication, we think that the owner has a right to assume that it will run to C. D., and govern himself accordingly.

In our opinion the tax deeds are invalid, and the decrees in both cases must be

REVERSED.

ANTROBUS V. SHERMAN.

65 230
92 118
65 230
4120 308

1. **Attorney at Law : DELEGATION OF AUTHORITY TO ANOTHER ATTORNEY: LIABILITY OF CLIENT FOR COSTS.** Where one employs an attorney to make a collection, and the attorney turns over the business to another attorney, who makes costs in the attempt to collect the claim, *held* that the client is not liable for such costs,—the attorney employed by him having no power to delegate his authority to another.

FRIDAY, DECEMBER, 5.

Appeal from Mills Circuit Court.

UPON motion certain costs, made by the sheriff by the service of notices in garnishment proceedings, were taxed against plaintiff, and judgment therefor rendered accordingly. Plaintiff appeals.

A. M. Antrobus, appellant, *pro se*.

P. P. Kelley, for appellee.

BECK, J.—I. The record discloses the following facts: Plaintiff sent the note upon which judgment in this case was rendered to Gregg, an attorney at law, for collection, who prepared a petition and other papers required in the commencement of a suit, and sent them to Hale, Stone & Proudfit, attorneys residing in the same county with defendant, with directions to file the papers and take other necessary steps in order to institute the suit. At the request of Gregg, these attorneys gave attention to the case, and finally procured judgment. After judgment, Gregg directed them to press the collection. They instituted garnishment proceedings, and costs thereon for sheriff's fees to the amount of \$116 were made. The purpose of the proceeding is to recover these costs from plaintiff. It is shown that plaintiff neither directed nor consented to the act of Gregg in transferring the case to Hale, Stone & Proudfit, and had no

knowledge thereof, or of the proceedings instituted by them, wherein the costs in controversy were made, and it is not claimed that he ratified their acts in any manner.

II. Plaintiff now insists that he is not responsible for the acts of Hale, Stone & Proudfit in the case, and is not liable for the costs made under their directions; that Gregg had no authority to employ them for him; and that the acts done in the exercise of their discretion do not bind him. A familiar and general rule of law applicable to the relation of principal and agent is, that the agent cannot delegate the authority conferred upon him to another, so that the principal will be bound by the acts done in the discretion of one to whom the agent attempts to delegate his authority. The rule is based upon the consideration that to the agent is confided a personal trust and confidence which controlled his appointment or selection, and is essential to the existence of the relation of principal and agent. We know of no rule excepting from the operation of this doctrine an attorney at law, whose duties, responsibilities and liabilities arise from the relation of agency existing between him and his client, though they are varied from those of other agents by consideration of the peculiar service he is required to perform. Indeed, it would appear, in view of the fact that attorneys are chosen by reason of their peculiar capacities and character, and other personal qualities, that the principles we have stated should be rigidly applied in cases of this kind. *Smalley v. Greene*, 52 Iowa, 241. We conclude that plaintiff is not bound by the acts of Hale, Stone & Proudfit in making the costs for which he is charged by the judgment of the court below. In support of this conclusion, see *Hoover v. Greenbaum*, 61 N. Y., 305; *Danly v. Crandol*, 28 Ark., 95.

III. Another question discussed by counsel, involving the position taken by plaintiff, that a part of the claim is barred by the statute of limitations, need not be considered, as the conclusion we have announced is decisive of the case.

REVERSED.

ENGs & SoNs v. PRIEST.

1. **Practice in Supreme Court: NEW TRIAL: VERDICT AGAINST EVIDENCE: PRESUMPTION IN FAVOR OF TRIAL COURT.** Where there has been a verdict for the plaintiff, and the court has granted a new trial on the ground that the verdict is not supported by the evidence, the order will not be disturbed on appeal, if there was evidence tending in any degree to establish any of the defenses pleaded. And where, in such case, there were two defenses, and there was no evidence to sustain the first, but some evidence to sustain the second, it must be presumed that the court's order was based on the evidence relating to the second defense.
2. **Sale: PLACE OF CONTRACT: INTOXICATING LIQUORS: CODE, § 1550.** Where orders for liquors were sent by defendant from Vermont to plaintiffs in New York by mail, and where other orders were taken by plaintiff's agent in Vermont, but sent by him to plaintiffs in New York, to be accepted or rejected by them at pleasure, and the liquors were consigned to defendant by rail, he paying the carrier's charges thereon, *held* that the contracts were consummated in New York, and were not in violation of the laws of Vermont in regard to the sale of such goods, and that recovery may be had thereon in this state, notwithstanding § 1550 of the Code. *Tegler v. Shipman*, 33 Iowa, 194, followed.

Appeal from Page Circuit Court.

FRIDAY, DECEMBER 5.

THIS is an appeal by plaintiffs from the order of the circuit court, setting aside a verdict in their favor, and granting a new trial.

W. P. Ferguson, for appellants.

Stockton & Keenan, for appellee.

REED, J.—This action was brought for the recovery of a balance alleged to be due on an account for certain intoxicating liquors sold by plaintiffs to defendant. Defendant pleaded in defense: (1) That said intoxicating liquors were sold in the state of Vermont, and in violation of the statutes

of that state; and (2) that the account was paid in full. The ground on which the verdict was set aside was that it was "contrary to and not sustained by the evidence." Under the settled and well-understood practice of this court, this order will not be disturbed, if there was any evidence tending, in any degree, to establish either of the defenses pleaded in defendant's answer. The first defense pleaded is based on section 1550 of the Code, which provides that "no action of any kind shall be maintained in any court of this state for intoxicating liquors, or the value thereof, sold in any other state or country, contrary to the law of said state or country." It was conceded on the trial that, if the sales in question were made in the state of Vermont, they were in violation of the statutes of that state. The evidence shows, without any conflict, that plaintiffs were wholesale dealers doing business in New York city, and that they shipped the liquors in question from there to defendant in the state of Vermont on orders, some of which were sent by defendant directly to the house by mail, and others of which were taken in Vermont by a traveling salesman in plaintiff's employ, who transmitted them to New York by mail. The liquors were shipped by rail, consigned to defendant, and he paid the carrier's charges thereon. So far as those liquors are concerned which were shipped on the orders sent directly by defendant, there can be no question but that the sales were consummated in New York. The delivery of the goods to the carrier in New York, to be transported to defendant, operated to transfer the title to him. The carrier was his agent, and received the goods for him. The salesman who received the other orders testified that all orders taken by him were transmitted by him to the house, to be passed upon by plaintiffs, and that the right to accept or reject any order after it was sent to them was expressly reserved by plaintiffs. Other employes of plaintiffs, and members of their firm, testified to the same fact. This evidence was in no manner contradicted. So far as the liquors sent on those orders were concerned, then, it is equally certain

Waters v. The Cass County Bank.

that the sales were made in New York. The case on this question is clearly within the rule of *Tegler v. Shipman*, 33 Iowa, 194. If the order setting aside the verdict was based on this ground alone, it is erroneous, and should be reversed. We cannot determine, however, that it was put upon this ground alone, and we cannot say that there is no evidence tending to establish the other defense. Defendant claimed in his testimony that he had paid for all of the goods sent him by plaintiffs. True, he was not able to state the times the different payments were made, or the amounts paid on the different occasions; but it is not for us to say that he is unworthy of credit. As the judge who heard the evidence thought the verdict was not sustained on this ground, as we must presume, we will not interfere with the order. It is, therefore,

AFFIRMED.

65	234
79	431
65	234
84	43

65	234
99	286
65	234
1107	62

65	234
130	473
65	234
131	508
1131	693

WATERS V. THE CASS COUNTY BANK.

1. **Chattel Mortgage: SALE OF CHATTELS BY MORTGAGOR: LIEN ON PROCEEDS OF SALE.** S., having mortgaged certain cattle to the defendant, sold them to A., who, by direction of S., gave to plaintiff, to whom S. was indebted, a draft for a part of the purchase-money. Plaintiff deposited the draft in the defendant bank to his own credit, and took therefor the "deposit check" on which this suit is brought for the recovery of the money. The defendant claimed to have a lien upon the money as the proceeds of the sale of the cattle, by reason of his unsatisfied mortgage thereon. *Held* that defendant's position could not be maintained; that its lien followed the cattle themselves, and not the proceeds, and that plaintiff was entitled to recover.

Appeal from Cass Circuit Court.

FRIDAY, DECEMBER 5.

THIS action was brought to recover \$400 upon what the parties denominate a deposit check. No copy of the instru-

ment is set out, but we infer that it showed a deposit of \$400 in the defendant bank, and a liability upon its part to repay the same. The defense is based upon the alleged fact that the money deposited did not belong to the plaintiff, but to the defendant, and that the deposit check was given by mistake. There was a trial without a jury, and judgment was rendered for the plaintiff. The defendant appeals.

Temple & Phelps, for appellant.

E. Willard, for appellee.

ADAMS, J.—The deposit in question was made by the delivery by plaintiff to the defendant of a draft. This draft was obtained by the plaintiff of one Alexander, and represented a part of the purchase-money of a herd of cattle bought by Alexander of one Saunders. By what contract between Alexander and Saunders the draft in question was given by Alexander to the plaintiff, is not distinctly shown. But it appears that Saunders was indebted to the plaintiff, and it was understood by plaintiff that this draft was given to him by Alexander in payment of Saunders' debt. Neither Alexander nor Saunders was examined as a witness, but the fact undoubtedly was that Saunders directed Alexander to make this payment. So far there is no controversy. The defendant's claim to the money paid the plaintiff in this draft rests upon the alleged fact that the defendant had a mortgage upon the cattle, given by Saunders to secure a debt which he owed the defendant bank; and its legal proposition is that, when the cattle were sold by the mortgagor to Alexander, the defendant's lien attached at once upon the purchase-money, and followed it after it passed into the hands of the plaintiff.

Some question is raised in regard to the fact of the existence of the mortgage upon the cattle sold. In the mortgage shown, the description of the cattle designed to be mortgaged is not very explicit, and it is not entirely certain that the herd sold did not embrace some cattle not included in the

Rasmussen, Adm'r, v. The Chicago, Rock Island & Pacific R'y Co.

mortgage. But we do not deem it necessary to determine this fact. The lien of the mortgage, without any question, so far as it existed upon the cattle sold, followed them into the hands of Alexander, and could not be divested by any payment which Alexander could make, short of a payment of the mortgage debt. At the time, then, of this transaction, the defendant's lien upon the cattle appears to have been unimpaired. If these cattle had been sold under some order of court by which the lien of the mortgage became divested, there would be some ground for contending that it was transferred to the proceeds. But a sale of the kind shown could not, we think, have such effect. Whether, if the circumstances were such that the defendant could not follow the cattle, it would have a remedy in equity, we do not determine. The defendant's remedy, so far as he has a remedy at law, is against Saunders, and against the cattle, if it can find them, and possibly against Alexander, if by any wrongful act of his the defendant has been deprived of its security.

We see no error in the ruling of the circuit court, and the judgment must be

AFFIRMED.

RASMUSSEN, ADM'R, v. THE CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY.

1. **Railroads: INJURY TO SHOVELER BY FALLING BANK: NEGLIGENCE: LIABILITY.** Where plaintiff's intestate had been for a long time engaged with others in removing a bank of earth, by repeatedly undermining the same, so as to bring the earth down from above, and he must have known as well as anyone the danger attending the work, and he made no objection to the method of doing the work, and he was finally killed by the sudden falling of earth upon him, *held* that plaintiff had no ground for recovery on account thereof against the defendant.

Appeal from Pottawattamie Circuit Court.

FRIDAY, DECEMBER 5.

Rasmussen, Adm'r, v. The Chicago, Rock Island & Pacific R'y Co.

THIS is an action to recover damages of the defendant for the death of one Larson, who it was alleged was killed by the falling of a bank of earth at which he was engaged in shoveling dirt. It is alleged that there was mismanagement and negligence in the company in the construction of the side-track, in use at the bank, so close to the bank as to interfere with the escape of the shovelers when the bank caved and fell, and that there was negligence in the manner in which the bank was worked, and that by means of such mismanagement and negligence the deceased was killed, and that the injury was occasioned without fault or negligence on his part. At the conclusion of the introduction of plaintiff's evidence, the defendant filed a motion for the court to direct the jury to return a verdict for the defendant, upon the grounds that there was no evidence showing any of the acts of negligence charged, and that the evidence showed without conflict that the deceased was guilty of contributory negligence, and that he assumed all the risks incident to the service in which he was engaged. The motion was sustained, and a verdict returned for the defendant, upon which judgment was rendered. Plaintiff appeals.

E. A. Babcock, for appellant.

Thos. S. Wright and Wright & Baldwin, for appellee.

ROTHROCK, CH. J.—It appears from the evidence that the deceased had been in the employ of the defendant for about one year. His employment was that of a shoveler in loading and unloading a gravel or dirt train. A switch was laid to a bank of earth near Avoca in the fall of 1879, and the deceased and the crew with which he was connected were engaged from that time until the accident happened in moving earth with an engine and train from the embankment, and depositing it at another point on the road. The work was done by undermining the embankment and allowing the dirt to fall, and then loading it upon the cars with shovels. This undermin-

ing was the mode adopted to bring the earth down. The accident which resulted in decedent's death occurred in January, 1880. On that day, he, with others of the gang, was engaged in undermining the bank, and part of it fell upon him, and he was instantly killed. There is not one word of evidence that he at any time made any objection to the manner in which the work was done. On the contrary, it affirmatively appears that he assisted in creating whatever danger there was in undermining the bank, and he must have seen and known, as clearly as anyone, the results likely to ensue from the work he and others did at the bank. The switch-track was laid near the bank, so that the dirt could be conveniently loaded upon the cars. The evidence does not show that there was any negligence in laying it too close to the bank, or that it could have been properly laid at any greater distance from the bank.

There was no conflict in the evidence, and we think, as matter of law, the plaintiff was not entitled to recover, and that the court correctly directed a verdict to be returned for the defendant.

AFFIRMED.

EVANS ET AL. V. THE CITY OF COUNCIL BLUFFS.

- 1. Cities and Towns: SEVERANCE OF TERRITORY: FACTS JUSTIFYING: TERMS OF.** Where lands included within the limits of a city are used wholly for cultivation, and are not needed for city purposes, and are not benefited by being within the corporation, they should be severed from the city upon the petition of the owners; and, where the lands have never been liable for municipal taxes, such severance should not be conditioned upon the payment by the owners of any portion of the indebtedness incurred by the city while the lands were attached thereto.

Appeal from Pottawattamie Circuit Court.

FRIDAY, DECEMBER 5.

65	238
86	317
65	238
129	53
65	238
138	630

THIS is a petition to sever certain territory from the city of Council Bluffs, upon the ground that the land composing said territory is wholly agricultural and farming lands, and so used and occupied, and that the same has never been used for any municipal purpose whatever, and has received no benefits or advantages by being within the corporate limits, and is not likely ever to be used for municipal purposes. Upon a hearing, an order was made that the territory in question be severed. Defendant appeals.

G. A. Holmes, for appellants.

Sapp & Pusey, for appellee.

ROTHROCK, CH. J.—The evidence shows that the territory sought to be severed is used exclusively for agricultural and horticultural purposes. It has never been laid off in lots, and is remote from any part of the city which is so laid off. It is conceded that the land embraced in the petition is not liable for municipal taxes. There is no evidence that the growth of the city will in the near future render it necessary that the lands in question should be platted as part of the city. All the evidence upon that point appears to us to be mere conjecture. Two railroads are built and in operation through the land, and it is insisted that the severance should not be made because, the city will thereby be deprived of the tax upon the two railroads in the territory in question. We think this consideration should not enter into the case. Cities ought not to be permitted to retain lands within their limits which are not needed for city purposes, and which are not benefited by being within the corporation, and against the will of the owners, for the mere purpose of deriving revenue therefrom. It is true, certain streets and roads have been opened and improved by the city, which are a benefit to the residents of the territory in question, but these are not more of a benefit to the petitioners than to other owners of farm lands adjacent to the city.

The court appointed commissioners, as provided by law, to adjust the terms on which the lands should be severed from the city. By agreement of the parties, the commissioners reported the assessed value of the entire city, and the assessed value of the portion sought to be severed, leaving the court to fix the terms of severance. Upon the return of the report, the court found "that there has not accrued and does not exist any liability of the city of Council Bluffs, during the connection of said territory with and as part of the city, for which said territory and the owners thereof are liable." Complaint is made of this finding. We think it is correct. It was found, and the city conceded, that the land was not liable for general municipal taxes. If not liable for city taxes, it should not be required to pay any indebtedness of the city incurred while it was attached to the city.

AFFIRMED.

65 240
107 658
65 240
128 521

THE STATE V. HOPKINS. (Two Cases.)

1. **Criminal Evidence: LARCENY: POSSESSION OF STOLEN GOODS: PRESUMPTION: EVIDENCE TO OVERCOME:** The presumption of guilt arising from the possession of recently stolen property is sufficiently overcome to justify a verdict of acquittal, when the defendant has introduced evidence, in explanation of his possession, which raises a reasonable doubt of his guilt. *State v. Richart*, 57 Iowa, 247, followed.

Appeals from Story District Court.

FRIDAY, DECEMBER 5.

These cases are submitted together as involving the same question of law. In the first case the defendant was convicted of stealing a horse from one Olson, and in the second case of stealing a horse from one Wicks. Judgment having been rendered upon the verdict in each case, the defendant appeals.

J. L. Dana, for appellant.

Smith McPherson, Attorney-general, for the State.

ADAMS, J.—The court in each case gave an instruction in these words: “If property recently stolen be found in the possession of a person other than the owner, the law presumes that the person so in possession stole such property, unless his possession is satisfactorily explained or accounted for consistently with innocence. Such explanation or satisfactory accounting for the possession of the stolen property may appear from the circumstances attending the possession, as shown by the state, or other proof, and by the preponderance which means the greater weight or value, of the evidence, and not merely by the greater number of witnesses who have testified to a particular fact or state of facts.” The giving of this instruction is complained of as being erroneous, by reason of the implication which it contains in relation to the necessity of a preponderance of evidence. In our opinion the instruction cannot be sustained. It was sufficient if the evidence was such as to raise a reasonable doubt of the defendant's guilt. *State v. Richart*, 57 Iowa, 247. The cases must be remanded for another trial.

REVERSED.

RUSSELL ET AL. V. THE FIRST NATIONAL BANK OF RED OAK.

1. **Appeal to Supreme Court: FACTS NOT WARRANTING: ALLOWANCE TO RECEIVER.** Where the court, by agreement of the parties, had made an allowance of compensation to a receiver, but no appeal was taken from the order of allowance, and, more than six months after the order was made, one of the parties moved the court to set aside and vacate the order, which motion the court overruled, *held* that, while the allowance was excessive, yet the remedy for the one aggrieved thereby was by appealing from the order of allowance within the time prescribed by statute, and that no appeal to this court from the order overruling the motion to vacate could be entertained.

Appeal from Montgomery District Court.

SATURDAY DECEMBER 6.

This is an appeal from an order overruling an application to set aside and vacate an allowance to a receiver previously made in the court below.

John Y. Stone and *P. P. Kelley*, for appellants.

Smith McPherson and *W. S. Strawn*, for appellee.

ROTHROCK, CH. J.—It appears from the record in the case that prior to the ninth of November, 1882, Russell & Co. had been engaged as merchants in the boot and shoe business; that they had given certain chattel mortgages upon their stock in trade. One of these mortgages was held by the defendant, and other mortgages were held by the plaintiffs and other parties. The defendant was proceeding to foreclose its mortgage upon the stock of goods, and the plaintiffs and other mortgagees commenced actions to restrain the foreclosure. Temporary injunctions were granted, and other creditors intervened in the actions. On the ninth day of November, 1882, all the parties being before the court, it was agreed between them that the sheriff should proceed to sell the stock of goods, and pay the proceeds of the sale into the hands of the clerk of the court, to abide the result of the suits. The contro-

versy between the parties involved questions as to the priority of their liens. Under the agreement, the sheriff sold the goods for over \$6,000, and in December, 1882, he paid into the hands of the clerk the sum of \$6,242. The matter stood thus until the next term of court, and at said term, and on the ninth day of April, 1883, a paper was filed in said causes, of which the following is a copy: "It is hereby stipulated and agreed that the above-entitled actions be transferred for hearing and determination to the district court of Mills county, Iowa; that the clerk of this court transmit the money in his hands to the clerk of said district court of Mills county, Iowa, and on filing herein the receipt of said clerk, and on the approval of the report of W. E. Pattison, Esq., as receiver, by this court, that he be discharged and exonerated from all liabilities in the premises, and that this court fix and allow his compensation as receiver." This paper was signed by the attorneys of the respective parties. On the same day the report of Pattison, as receiver, was presented to the court, and an order was made allowing him the sum \$400 for his services as receiver.

On the eighteenth day of October, 1883, plaintiffs filed a motion to vacate and set aside the allowance made to Pattison, on the ground that the same was illegal, excessive, and void, and in violation of law, and that Pattison was not, by order of the court, appointed a receiver, and that all the acts done and performed by him were done as the clerk of said court, and not as receiver. The motion was overruled on the ninth day of November, 1883. There is some controversy between counsel as to whether there was a formal order appointing Pattison as receiver. As this question is not, in our opinion, material to a determination of the appeal, we have not thought it necessary to resort to the transcript to settle it. By the stipulation entered into on the ninth day of April, 1882, it was expressly agreed that the court should act upon the report of Pattison as receiver, and fix and allow his compensation as receiver. This was a recognition of his services

as receiver, and an agreement that the court should fix his compensation; and the only question of which appellants could complain was, whether or not the court abused its discretion in making the allowance. The parties expressly gave the court jurisdiction to make some allowance. If the appellants felt aggrieved at the amount allowed, they should have appealed from the order within the time allowed for an appeal. They did not do this. They did not even file the motion to vacate the order until more than six months after it was made, and they did not attack the order on the ground of accident, fraud, or misconduct of any of the parties. Under these circumstances we cannot entertain the appeal. The allowance made to the clerk appears to us to be greatly excessive. His duties as clerk require him to receive and pay out money ordered to be deposited in court. But, if we were to reverse the ruling of the court below, we would commit this court to a rule which would enable the parties to evade the statute limiting the time within which appeals may be taken, by authorizing appeals from the orders overruling motions to set aside judgments and orders, when the appeals should be taken from the orders or judgments complained of. The motion in this case is unlike a motion made to retax costs. In this case, Pattison, in his report, upon which the court acted, made a claim of \$400 as compensation. The plaintiffs should have then and there resisted the claim, and appealed from the allowance.

AFFIRMED.

JACOBS V. TOBIASON.

1. **Contract: AGAINST PUBLIC POLICY: VOID: INSTANCE.** Proceedings for the establishment of public highways are essentially public in their character, and are for the benefit of the whole people; and while such proceedings are begun voluntarily by private persons, and while, also, such persons may not be compelled to prosecute such proceedings to a final result, yet an agreement to abandon such prosecution, in consideration of money to be paid for such abandonment, is against public policy, and void in law, and cannot be enforced.

Appeal from Jones District Court.

SATURDAY, DECEMBER, 6.

It is alleged in the petition that in the month of May, 1882, two causes were pending in the circuit court of Jones county, in one of which defendant, Tobiason, was plaintiff, and this plaintiff and others were defendants; and in the other one H. F. Wilkins was plaintiff, and this plaintiff and others were defendants; and that plaintiff and defendant entered into a contract for the compromise and settlement of said causes, whereby defendant agreed, in consideration that plaintiff would refrain from contesting said causes further, he would pay plaintiff the sum of \$100, and in addition thereto would pay the costs of said causes; and that plaintiff, relying on said promise and agreement, did refrain from further contesting said causes, and they were afterwards disposed of by the court, but that defendant neglected and refused to pay said sum of money or said costs, and the prayer is for judgment for the amount thereof. The answer alleges that said causes were appeals from the award of damages in a proceeding for the establishment of a public highway; that plaintiff and the persons who were his co-defendants in said causes were the petitioners for the establishment of said highway, and defendant and said Wilkins filed their claims for damages on account of the establishment of the same, and

that such proceedings were had on said claims that each of the claimants was awarded a sum as damages thereon, and plaintiff and the other petitioners for the road paid the amount of such awards to the auditor, and that thereupon said road was established as a public highway, and opened and worked as such; but that the claimants refused to accept the amounts of the awards, and appealed therefrom, and that the agreement alleged in the petition was entered into while said appeals were pending in the circuit court, and was made for the purpose of defeating the order of the board of supervisors, and of preventing the establishment of said highway and its use by the public, and was therefore void and against public policy. The verdict and judgment were for defendant. Plaintiff appeals.

E. Keeler and Sheean & McCarn, for appellant.

J. W. Doxsee, for appellee.

REED, J.—Plaintiff was examined as a witness in his own behalf, and his testimony was the only evidence introduced on the trial. He testified in substance that after the appeals were taken, and while the causes were pending in the circuit court, an agreement was entered into between him and defendant for the settlement of the causes and their final disposition; that his undertaking in the agreement was that he would make no further appearance in the causes, and would cease all efforts for procuring the final establishment of the highways, and that he would withdraw the money which he had deposited with the county auditor for the payment of the awards; and that defendant agreed, in consideration of his doing these things, to pay him \$100, and to take care of the costs in the cases; and that he had paid out as attorney's fees, and other expenses incurred by him in the proceeding to establish the highway, about the sum of \$100; and that the object of the parties in entering into the agreement was to put an end to the proceeding, and to reimburse him for the expenses he had

incurred therein. On this testimony the circuit court ruled that the contract was against public policy, and was therefore not enforceable; and the jury were directed to return a verdict for defendant; and the only question presented by the record is as to the correctness of this ruling. We think the ruling is correct. Proceedings for the establishment of public highways are essentially public in their character. They are in the exercise by the state of one of its sovereign powers. The rights which are established and the privileges which are created by the proceedings are for the benefit of the whole people.

The proceeding can be instituted, it is true, only on the petition of some member of the public who is interested in the question, and it may be carried on in his name, and he may be made responsible for the costs occasioned by it, and, if damages are awarded to those whose lands are appropriated for the use of the highway, he may be required to pay the same as a condition to its establishment, and, if an appeal be taken from such award, he may be made a party to the litigation thus instituted, and may ultimately be compelled to pay the costs occasioned by it. Code, Title VII, Chap., 1. But the proceeding is not for his benefit. It is a proceeding by the state for the benefit and advantage of all the people of the state, and the petitioner acquires no special rights or advantages by it. In so far as his efforts are instrumental in procuring the establishment of the highway, he acts for the public. In instituting and carrying on the proceeding, he acts, in a sense, in a public capacity. He invokes the power of the state, and it is exercised for the benefit of the common public, and he, in a sense, represents that public, and stands for it in the proceeding. It is true, he cannot be compelled to institute the proceeding, and it may be true, also, that, having voluntarily begun it, he cannot be compelled to continue it to a final result. If it turns out that the burthens likely to be imposed upon him are greater than was anticipated when he instituted the proceedings, it may be that he has the right to retire

Bradstreet v. Dunham et al.

from them, or discontinue them entirely. But when he has assumed a position of trust towards the public, and instituted a proceeding of public concern, he cannot be permitted to make the question whether he will remain in the position or continue the proceeding a matter of private bargain for his own emolument. One occupying a public office has the undoubted right to resign his position. But if a public officer were to agree with one who, for any reason, was desirous that a vacancy in the office should be created, that for a money consideration he would resign the office, it would hardly be contended that such contract was enforceable. Yet it seems to us there is no difference in principle between that case and the one before us. The highest considerations of public policy demand that all duties in which the state and public are concerned shall be performed with fidelity; and no man who has once assumed the performance of such duties should be permitted to make the question whether he will continue in their performance a matter of private speculation.

We think the judgment of the circuit court is right, and it is

AFFIRMED.

BRADSTREET V. DUNHAM ET AL.

1. **Conveyance: DESCRIPTION: STREET AS BOUNDARY: VARIANCE BETWEEN SURVEY AND PLAT.** Plaintiff conveyed to defendant a tract of land, bounded on the north by "Buckeye street" in a certain town, —said street being the southern boundary of an addition which plaintiff had made to the town. The street, as actually surveyed and marked by visible monuments, was 60 feet north of the street as shown by the recorded plat of the addition. *Held* that the conveyance entitled defendants to hold possession of the land up to the street as actually surveyed, and, as between the grantor and grantee, it was immaterial whether or not, on account of failure to comply with the law, the plat operated as a statutory dedication of the street.

65	248
87	206
65	248
110	586
110	587
65	248
111	420

2. **CITIES AND TOWNS: COMMON LAW DEDICATION OF STREET: WHAT IS NOT.** There can be no common law dedication of a street to public use without the *animus dedicandi* on the part of the land owner, coupled with use by the public.

Appeal from Jones District Court.

SATURDAY, DECEMBER 6.

ACTION in chancery to quiet the title and recover possession of land. Upon a trial on the merits, a decree was entered dismissing plaintiff's petition, from which he appeals.

Herrick & Doxsee and *Sheean & McCarn*, for appellant.

Monroe & White and *E. Keeler*, for appellees.

BECK, J.—I. The undisputed facts of the case, and the questions in controversy between the parties, may be briefly and clearly stated without reciting the pleadings. The plaintiff conveyed to the defendants a tract of land, part of the northern boundary of which is described as the center line of Buckeye street, in the town of Monticello. This street was in the addition to the town made by plaintiff, and was the southern limit thereof at that locality. When the addition was surveyed, stones were set up at some of the corners of lots abutting upon the street, and stakes were planted at other corners. The surveyor, in platting the addition, through mistake made the plat to show a tier of lots south of the real survey, so that there were five more lots shown by the plat than were really surveyed, thus causing the south boundary of the addition, and the south boundary of Buckeye street, to appear in the plat to be 60 feet further south than they were, in fact, as surveyed. The plat was duly acknowledged by plaintiff, and was approved by the proper officers, and recorded. The contentions of the parties involve the boundary of the addition and of the street; plaintiff insisting that it is controlled by the plat, while defendants maintain that it

is to be determined by the survey. Defendants are in possession of the land, and by this action plaintiff seeks to recover possession and quiet the title of the realty.

II. Counsel on both sides unite in the position that the location of Buckeye street determines the rights of the parties, being made the northern boundary of the land in dispute. We are therefore required to decide whether the line of the street is determined by the survey, or by the recorded plat. The actual survey manifested the intention of the plaintiff in fixing the line of the street, which was indicated by the monuments fixed in the ground. The plat is but evidence of the expressed intention of the plaintiff,—the means of providing a record thereof; in other words, it is the record of the survey. But, through mistake, the record fails to present truly the actual survey. Now, as the survey established the line of the street, it must prevail against the plat, as between plaintiff and defendant, whose rights are alone brought in question. It is proper to remark, in this connection, that plaintiff still owns the lands laid off into lots immediately adjacent to the street, which has not been opened. Neither the rights of the public nor any claimant of the property, except the parties hereto, are involved in this case, nor can they be affected by it. The case simply presents questions involving an inaccurate, not to say a false, record between the parties primarily affected thereby. No question of a purchaser without notice of the mistake is presented by the facts. Plaintiff is bound by the survey, for it is the true expression of his intention. He cannot insist that defendants shall be bound by the plat, for it does not express the obligation—the contract—which plaintiff assumed in making the survey.

III. Plaintiff insists that by reason of non-compliance with the law, which requires stakes in the corners of the lots, and for other reasons, the plat does not operate as a statutory dedication of the land. Let this position be admitted, and

1. CONVEY-
ANCE: de-
scription:
street as
boundary:
variance be-
tween survey
and plat.

yet plaintiff is not aided by it. If there was no statutory dedication of the street, the law will still regard the description of the deed, and will seek to discover the boundary indicated thereby. It will seek to determine what line was meant by the grantor by the words "Buckeye street" used in the deed. This line was plainly indicated by the survey, and the stones placed in pursuance thereof. The law will declare the line disclosed by the monuments, and lawful evidence in aid thereof, to be the line of the street, even though there be no statutory dedication thereof.

IV. But plaintiff's counsel insist that there exists under the plat what they call "a common law dedication," which corresponds with the lines indicated by the plat. This position cannot be admitted. It is an undisputed fact that essential elements to constitute dedication of the street at common law, as indicated by the plat, are wanting. These are the *animus dedicandi* on the part of the plaintiff, and use by the public. The plaintiff never intended to dedicate the street as described in the plat, and the public have never used it as a highway. It has all the time been inclosed, and is now in defendant's possession. We are not required to cite authorities to show that, when there is no *animus dedicandi* by the land-owner, and no occupancy by the public, a highway does not exist as against the land-owner himself and those holding under him.

V. We need not determine whether evidence of the parties' declarations and statements prior to or at the time of the execution of the deed is competent to show the line of the land as it was understood by them. If evidence of this character introduced in this case be competent, it surely does not show that the line as indicated by the plat was contemplated by the parties. Nor is there evidence establishing an agreement between the parties that this line should be regarded as the true line of the street. The case is simply that of a conveyance of lands, bounded by a line indicated in

2. CRIMES and towns : common law dedication of street : what is not.

the deed, which may be discovered by existing monuments planted in pursuance of an actual survey. It is our opinion that the decree of the district court ought to be

AFFIRMED.

ANDERSON & Co. v. CAHILL.

1. **Practice: NEW TRIAL: EVIDENCE TO SUSTAIN VERDICT.** Where there is no conflict in the evidence, and the correctness of the verdict can be demonstrated by a mathematical calculation, the trial court has no discretion in the premises, and an order setting aside the verdict and granting a new trial must be reversed on appeal.
2. ———: **ERROR IN GRANTING NEW TRIAL: NOT WAIVED BY MOTION TO RECONSIDER.** Where there was error in granting a new trial, the aggrieved party did not waive the error by filing a motion asking the court to re-examine the question determined.

Appeal from Fremont District Court.

SATURDAY, DECEMBER 6.

THE petition states that in November, 1880, the defendant sold the plaintiff 3,000 bushels of shelled corn, for which the plaintiff agreed to pay $26\frac{1}{2}$ cents per bushel, and that the corn was to be delivered in January, 1881. The petition further states that the plaintiff paid the defendant, at different times subsequent to the time the contract was entered into, the sum of \$451. The contract was in writing, and the petition stated that the time for the delivery of the corn was extended by parol; that plaintiff had demanded the corn, and defendant refused to deliver the same, or to refund the money received; that by reason of the defendant's failure to deliver the corn the plaintiff had been damaged. To recover such damages and the money paid was the object of this action. The defendant answered the petition, and admitted the execution of the contract, and that he had received \$350, but denied that the time for the delivery of

the corn had been extended, and alleged that he had offered to deliver the corn, but that the plaintiff had refused to receive the same, and that, because of such refusal, the defendant had been damaged, for which he asked judgment. Trial by jury. Verdict for the plaintiff for \$351.70. On motion of the defendant a new trial was granted, on the ground that "the verdict is not sustained by sufficient evidence, and is contrary to the weight of evidence," and the plaintiff appeals

Stockton & Keenan, for appellant.

Anderson & Eaton, for appellee.

SEEVERS, J.—I. Neither party excepted to the instructions of the court, and therein the court said to the jury that "defendant admits that he received \$351 on the contract, but denies that he received more than this. In settling the account, you must allow the plaintiff at least that amount." The court further instructed the jury in relation to the refusal of the plaintiff to receive the corn, and left it to the jury to say whether the contract had been rescinded by the acts and conduct of the plaintiff. The jury must have found that the contract had not been rescinded, and it is quite evident that the jury decided that the plaintiff was not entitled to recover any sum as damages for the failure to deliver the corn. The defendant delivered a part of the corn. We have some difficulty in determining from the evidence the number of bushels; but counsel for the appellant state in their argument that the quantity delivered was one hundred and ninety-nine bushels and six pounds. This is not denied by counsel for the defendant, and we therefore assume it to be correct. At the contract price, the corn so delivered will not amount to more than \$52.26, which, deducted from the \$351 which defendant admits he received, leaves \$298.74, which sum, with interest, the plaintiff, under the instructions of the court, was

1. PRACTICE:
new trial:
evidence to
sustain ver-
dict.

clearly entitled to recover. The court instructed the jury that the plaintiff would be entitled to interest from the time the contract was terminated; and the jury must have found, under the evidence, that this was May, 1881. The trial was on October 20, 1883. The plaintiff was, therefore, entitled to interest on \$298.74 for the period of two years and five months, at six per cent, which would amount to at least the sum of \$43.21, which, added to \$298.74, amounts to \$341.95, being a few cents more than the verdict.

There is not the slightest conflict in the evidence in relation to the facts above stated. The verdict might have been for more, but it could not, under the instructions of the court, have been for less. If there had been a conflict in the evidence, the judgment of the district court could not have been disturbed, under the settled practice of this court; but, as no such conflict exists, and the substantial correctness of the verdict can be demonstrated by a mathematical calculation, the district court has no discretion in the premises, and therefore erred in granting a new trial.

II. After the motion for a new trial had been sustained, the plaintiff filed a motion asking the court to re-examine the question determined. This motion was overruled. It is insisted by counsel for the defendant that by filing such motion the error in granting a new trial was waived. No authority is cited, but we suppose counsel rely on the class of cases in which it is held that by filing an answer an error committed in overruling a demurrer to the petition is waived. There is a clear distinction, we think, between such cases and this. In the case at bar, no new pleading was filed, and the court was simply asked to correct an error, the facts being precisely the same as when the error was committed. The court could have done this on its own motion, and the plaintiff waived nothing by asking the court to reconsider the question. The cause will be remanded, with directions to enter judgment on the verdict.

REVERSED.

2. — : error in granting new trial: not waived by motion to reconsider.

*Martin v. Martin.***MARTIN V. MARTIN.**

1. **Divorce: CONTRACT FOR ALIMONY: VALIDITY OF: CODE, § 2203.** The power of husband and wife to contract with reference to the amount which shall be awarded the wife as alimony, on the dissolution of the marriage relation by divorce, has been recognized by this court in the case of *Blake v. Blake*, 7 Iowa, 46, and subsequent cases; and such power is not taken away by § 2203 of the Code. But courts will, in every case, scrutinize the transaction very closely, and the contract will not be enforced, unless it appears to have been entered into fairly, and to be reasonably just and fair to the wife.

Appeal from Fremont Circuit Court.

SATURDAY, DECEMBER 6.

ACTION FOR DIVORCE. The judgment of the circuit court was for plaintiff, granting her a divorce and the custody of her minor child; also granting her an allowance as alimony. Plaintiff appeals from the portion of the judgment awarding her alimony.

Holmes & French, for appellant.*J. W. Dalby*, for appellee.

REED, J.—Defendant alleged, in one division of his answer that before the commencement of the suit he and plaintiff, by mutual consent and agreement, separated, and that they then entered into a written contract by which plaintiff agreed, in consideration of the conveyance by him to her of certain real estate, and the delivery to her of certain personal property, and the payment to her of certain money, that in her action of divorce she would make no claim for alimony, either temporary or permanent, and that she would release him from all liability for the support of their minor child; and he alleges that he has fully performed all of his undertakings in said contract. This matter is pleaded in bar of plaintiff's right to recover alimony, or any allowance for the

65	255
84	371
65	255
105	623
65	255
110	503
65	255
114	708
65	255
136	596
65	255
139	422

support of said minor child. Plaintiff demurred to this division of the answer, on the ground that the alleged contract was illegal and void. The circuit court overruled the demurrer, and this ruling is assigned as error. That a contract of this character between husband and wife, during the continuance of the marriage relation, would at common law be void, cannot be doubted. But it was held in *Blake v. Blake*, 7 Iowa, 46, that the capacity of the parties to contract with each other was so enlarged by the statutes of this state, as that a contract of this character, if it was supported by a just and adequate consideration, and was untainted by fraud, or circumvention, or improper influence, would be enforced; and this holding was adhered to in the subsequent cases. Since these holdings, however, the legislature enacted section 2203 of the Code. This section provides that, "when property is owned by either the husband or wife, the other has no interest therein which can be the subject of contract between them, * * * * *" and it is contended by plaintiff that under this section contracts like the one in question, between husband and wife, are prohibited. If the contract is valid, its effect, when enforced by the judgment of the court, is to deprive plaintiff of all interest in the property of defendant, except such as was conveyed or delivered to her in pursuance of it.

The question whether the contract is prohibited by the statute depends on whether the wife's right to an allowance out of the estate of the husband as alimony, on the dissolution of the marriage relation for the fault of the husband, creates in her a right or interest in his property. If, by virtue of her right to alimony, she has a right or property interest in his estate, it is clear that she cannot divest herself of that right or interest by contract with him. But we are of the opinion that her right to alimony does not create in her an interest in his property. Alimony is an allowance out of the estate of the husband for the maintenance of the wife after the dissolution of the marriage relation. During the exist-

Martin v. Martin.

ence of that relation he is under legal obligation to afford her support, and, upon its dissolution by divorce, this obligation is not determined. The judgment for alimony does not create a new obligation or duty in that respect. It but determines the extent of the existing obligation, and regulates the manner of its performance. The wife's right to a support during the existence of the marriage relation does not create in her a property right or interest in his estate. It is in the nature rather of a demand against him, enforceable as ordinary money demands are enforced. We think, therefore, that the power of the parties to contract with reference to the amount which shall be awarded the wife as alimony, on the dissolution of the marriage relation by divorce, is not taken away by the section of the statute in question. The courts, however, will in every case scrutinize the transaction very closely, and the contract will not be enforced unless it appears to have been fairly entered into, and to be reasonably just and fair to the wife.

By the judgment of the circuit court the title to all the property conveyed to plaintiff in pursuance of the contract is confirmed in her; and, in addition to this, defendant is required to pay a stated allowance for the support of the minor child. He is also required to pay the costs of the proceeding, including an attorney fee for plaintiff's attorney. We find no evidence of any fraud or circumvention in the execution of the contract. Plaintiff voluntarily entered into the contract, and, by the judgment, she obtains all she contracted for, and more; and we think she has no grounds of complaint.

AFFIRMED.

HALL V. THE CHICAGO, BURLINGTON & QUINCY R'Y CO.

1. **Justice's Court: PRACTICE: DEMAND FOR JURY: WHEN TO BE MADE.**

In an action in justice's court, if either party desires a jury, demand must be made therefor "at or before the time for joining issue." Code, § 3537. And, although defendant appeared and filed an answer within 15 minutes after the hour at which the notice was returnable, yet plaintiff was not required to give any attention to the case until one hour after the return hour; (Code, § 3525;) and "the time for joining issue" did not expire until he had a reasonable time, after appearing within the hour, to examine the answer, and determine what course he would pursue in relation thereto; and a demand for a jury within such reasonable time, to try the issue raised by the answer, was not too late, though made more than an hour after the return hour. Where the hour for appearance has been extended by agreement, the time for joining issue will be correspondingly extended.

Appeal from Mills Circuit Court.

SATURDAY, DECEMBER 6.

John Y. Stone, for appellant.

P. P. Kelley, for appellee.

REED, J.—This case was brought originally before a justice of the peace. The action is on a money demand, the amount claimed being \$21. Judgment was rendered for plaintiff in the justice's court for the amount claimed. Defendant then removed the cause into the circuit court by writ of error. On the hearing in the circuit court the judgment of the justice was affirmed. The cause comes into this court on the following certificate of the trial judge, viz.: "It is hereby certified that there is a question of law involved in this cause, upon which it is desirable to have an opinion of the supreme court, to-wit: The original notice was made returnable before a justice of the peace at 9 o'clock A. M. Within 15 minutes thereafter defendant filed answer. The parties did not then immediately proceed with the trial, but waited until after 10

o'clock for another of plaintiff's attorneys to come to take part in the trial. At 10 minutes past 10 o'clock, and before the trial had, in fact, been commenced, the plaintiff, for the first time, demanded a jury, which was granted by the court, against the objections of the defendant. Did the demand for a jury come too late? Was the plaintiff entitled to a jury at that stage of the proceedings?" It is provided by section 3537 of the Code that "unless one of the parties demand a trial by jury at or before the time for joining issue, the trial shall be by the justice;" and it is quite apparent that the true answer to the question certified depends on the construction which shall be put upon the words "at or before the time for joining issue," as used in this section.

The proceedings in a justice's court are governed by substantially the same rules which are applied in the circuit court. Sections 3516-3530. The same pleadings may be filed there which are required to be filed in like cases in the circuit court, or they may be stated orally by the parties and written down by the justice on his docket, and any pleading may then be assailed by motion or demurrer, the same as in the circuit court. The issue cannot be said to be joined in any case until all questions relating to the pleadings are settled, and, so long as the right remains to either of the parties to assail any pleading by motion or demurrer, "the time for joining issue" has not expired. When defendant filed its answer, plaintiff had the right, if he deemed it objectionable in any respect, to assail it by motion or demurrer, and he had a reasonable time within which to do this. But he was not required to appear or give any attention to the answer until 10 o'clock. Section 3525. If he had not appeared until that hour, no advantage could have been taken of his absence, but he would have had a reasonable time thereafter in which to examine the answer and determine whether he would go to trial on the pleadings as they then stood, or file a reply to the answer, or assail it by motion or demurrer; and "the time for joining the issue" would not have expired until he had

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had an opportunity to do this. The parties, by agreement, as we infer, awaited the arrival of one of plaintiff's counsel, and he arrived at the office of the justice after 10 o'clock.

The agreement does not appear to have been coupled with any condition as to the pleadings. Nor does it appear that plaintiff had determined what course he would take with reference to them. He had the right, as we have seen, to plead to the answer after 10 o'clock, and we think the agreement to wait until the counsel arrived operated to continue his right in that regard until that time. If his attorney, when he arrived, had deemed it important to file a reply, or to assail the answer by motion or demurrer, there can be no doubt that he would have had the right to do so. We think, therefore, that the circuit court rightly held that the demand for a trial by jury was not too late, and the judgment is accordingly

AFFIRMED.

KURTZ & BITTINGER V. HOFFMAN.

1. **Appeal to Supreme Court: AMOUNT IN CONTROVERSY: JURISDICTION.** Where the petition claimed less than \$100, and the answer alleged payment of more than \$100, but did not set up a counter-claim, nor ask judgment against plaintiff for any balance, the amount in controversy was less than \$100; and this court has no jurisdiction to entertain an appeal in such case, without the certificate of the trial judge required by § 3173 of the Code, even though the case was tried below, and is presented in this court, on the theory that the answer did plead a counter-claim.
2. ———: ———: ———: **COUNTER-CLAIM ABANDONED.** In the case above stated, even if it were admitted that the answer pleaded a counter-claim for more than \$100, yet, if defendant failed to support it by any evidence, he thereby abandoned it, and the amount claimed therein could no longer be said to be "in controversy," within the meaning of § 3173 of the Code.

Appeal from Linn Circuit Court.

SATURDAY, DECEMBER 6.

Kurtz & Bittinger v. Hoffman.

ACTION upon an account for goods and merchandise. There was a judgment upon a verdict against defendant, from which he appeals.

Charles W. Kepler, for appellant.

Davis & Brooks, for appellee.

BECK, J.—I. The petition declares upon an account, and claims to recover thereon \$83. The account is made an exhibit, which shows certain credits, and that there is a balance due plaintiffs, which they seek to recover in this action. The answer denies “the correctness of all items charged against defendant,” and alleges that he “is entitled to a further credit of \$125 on account of wood sold.” The answer also pleads the bar of the statute of limitations. It does not set up a counter-claim, and asks no judgment against plaintiff, except for costs.

II. Upon this statement of the contents of the pleadings, it clearly appears that “the amount in controversy between the parties, as shown by the pleadings, does not exceed \$100.” Code, § 3173, provides that in such a case an appeal will not lie except upon the certificate of the judge, which was not given in this case. While the allegations of the answer show that defendant’s account exceeds \$100, yet he claims no judgment thereon; he simply shows by his answer that he has paid plaintiff a sum exceeding \$100, and seeks upon this allegation to defeat plaintiff’s claim, which is less than \$100. The amount in controversy, therefore, is less than \$100. The defendant, in fact, pleaded no counter-claim in his answer. He simply sets up the item of his account as payment *pro tanto* upon plaintiff’s claim.

III. But plaintiff’s counsel admit that the answer does plead a counter-claim, and the court below was also led into that view. But we are not bound to adopt this erroneous conclusion. Because counsel for plaintiff, in their argument in support of the decision of the court below, take an errone-

1. APPEAL to
supreme
court :
amount in
controversy :
jurisdiction.

ous position, we are not bound to reverse the judgment, when their exist other reasons, which are sound, requiring its affirmance.

IV. But, even should we adopt the view of counsel and the court below, we are of the opinion that, in the case as tried, the sum claimed by plaintiff was the only amount in controversy. The court below directed the jury that defendant's counter-claim should not be considered, for the reason that no testimony in support thereof was introduced in evidence upon the trial. This instruction was not excepted to, nor is it complained of in this court. The fact it recites must be regarded as a verity. By failing to support by evidence his counter-claim, if it was pleaded, defendant abandoned it. There was, therefore, at the trial no amount in controversy exceeding plaintiff's claim. Now, if defendant really pleaded the counter-claim, and on the trial abandoned it, or admitted that he was not entitled to recover thereon, or in any other way withdrew it from the consideration of the court, the amount set out in his pleading as a counter-claim was not in controversy. Not only must the pleadings show a sum in excess of \$100 to be involved in the suit, but that sum must be in controversy. It cannot be so regarded if, by admission at the trial, or abandonment of the claim, it is withdrawn from the consideration and decision of the court.

We reach the conclusion that we have no jurisdiction in the case. The appeal, therefore, must be

DISMISSED.

NORMAN V. WINCH.

1. **Damages; MEASURE OF: BREACH OF COVENANT OF SEIZIN.** In an action for breach of covenant of seizin, if plaintiff had been ousted from the land by reason of the breach, the measure of her damages would have been the consideration paid, and interest; but where she made no proof of the consideration paid, and failed to show that there was any threatened disturbance of her possession, she was entitled to recover, if at all, only nominal damages. *Nosler v. Hunt*, 18 Iowa, 212, followed.
2. **New Trial: FAILURE TO ASSESS NOMINAL DAMAGES.** An omission to assess nominal damages, where there is a mere technical right to recover, is no ground for a new trial. *Watson v. Van Meter*, 43 Iowa, 76, followed.

Appeal from Monona District Court.

SATURDAY, DECEMBER 6.

THIS is an action at law. It was originally commenced by A. J. Norman and Lucinda M. Norman, as plaintiffs. A motion was made by defendant attacking the petition. The motion was sustained. Thereupon A. J. Norman dismissed the action as to himself, and the present plaintiff, Lucinda M. Norman, filed a new petition, in which she sought to recover of the defendant the sum of \$25 for failure to enter satisfaction of a certain mortgage, and she also claimed that she was entitled to recover damages of the defendant for a breach of the covenant of seizin in a conveyance of five acres of land, executed by the defendant to her. No evidence was offered upon the cause of action for the alleged failure to satisfy the mortgage. There was a trial to the court upon the cause of action for a breach of covenant, and a judgment was rendered for the defendant for costs. Plaintiff appeals.

S. H. Cochran, for appellant.

J. W. Barnhart, for appellee.

ROTHROCK, CH. J.—I. Complaint is made because the court

65	263
83	283
65	263
115	561
65	263
116	303

rendered a judgment against A. J. Norman for costs. The record does not show that a judgment was rendered against him, and it does not appear that he appeals. We ought not to be called upon to presume that a judgment was rendered against a person not a party to the action.

II. It appears that on the twenty-sixth day of June, 1873, William N. Perry conveyed the land in controversy by a deed of general warranty to one La Soward. La Soward conveyed to Winch by deed of general warranty on the fourth day of January, 1877, and Winch conveyed to the plaintiff in January, 1881. Perry did not have the legal title; but La Soward took actual possession of the land when it was conveyed to him, and the subsequent grantees have had actual possession since. The plaintiff has never been disturbed in her possession, and more than ten years have elapsed between the commencement of the possession by La Soward and the commencement of this suit. The plaintiff does not offer to surrender the land. What she evidently seeks is to hold the land and recover damages for its value. If she were ousted from the land by reason of the breach of the covenant, her measure of damages would be the consideration paid, and interest. She makes no proof of the consideration, and she does not show that there is any threatened disturbance of her possession. Under these circumstances, if entitled to recover at all, her damages are merely nominal. *Nosler v. Hunt*, 18 Iowa, 212. And "an omission to assess nominal damages, where there is a mere technical right to recover, is no ground for a new trial." *Hudspeth v. Allen*, 26 Ind., 167; *Watson v. Van Meter*, 43 Iowa, 76.

AFFIRMED.

MILNER ET AL. V. DAVIS ET AL.

1. **Fraudulent Conveyance: BROTHER TO BROTHER: EVIDENCE ESTABLISHING.** A conveyance by one of the defendants to his brother of his interest in his mother's estate, under the circumstances disclosed by the evidence, (see opinion,) *held* void, as being in fraud of creditors.

Appeal from Pottawattamie District Court.

SATURDAY, DECEMBER 6.

ACTION IN EQUITY. Decree for the plaintiffs, and defendants appeal.

E. A. Babcock, for appellants.

Dailey & Smith, for appellees.

SEEVERS, J.—The defendants are brothers, and the plaintiffs claim that M. J. Davis sold to Joshua Davis, his co-defendant, a large amount of real and personal property, for the purpose of hindering, delaying and defrauding his creditors. The mother of the defendants died on December 7, 1881. The property sold was inherited from her, and consisted of real estate, horses, cattle, sheep, hogs, wool, wheat, corn, farming utensils and money; the interest of M. J. Davis therein being the undivided one-sixth part. Within less than ten days after he inherited the property, M. J. Davis sold such interest. The two brothers lived at that time about six miles from each other, and M. J. Davis reached the house of his brother Joshua at a very early hour in the morning, and the sale was made immediately thereafter. M. J. Davis did not look at the personal property, and did not know how many horses, cattle, hogs, or how much grain there was. He had no knowledge of the value of the farming utensils, nor the amount of money on hand at the decease of his mother, except what he learned in relation thereto from Joshua during the negotiations. The

property was sold in a lump, or all together. If a separate value was placed on any article, the defendants are unable to state what such value was.

Joshua agreed to give \$885 for the entire interest of M. J. Davis, and the latter accepted it; \$300 to be paid in two years, the same amount in four years, and the residue in six years, without interest. M. J. Davis was largely indebted, and we are satisfied that Joshua had knowledge of this fact. The inadequacy of the consideration is not great, but the interest of M. J. Davis in his mother's estate was worth, as we find from the evidence, from \$200 to \$300 more than Joshua agreed to give. Besides this, the notes given were not worth their face value. Reducing the notes to their cash value, we think the inadequacy of the consideration agreed to be paid for the property was at least \$500. The sale was made in an unusual manner. It was made at an unusual hour, in a hurried manner and without examination of the property sold. Joshua had but little, if any, knowledge of the value of a portion of the real estate.

Without setting out the evidence at length, or commenting thereon to any greater extent, we deem it sufficient to say that we have each separately read the evidence, and separately reached the conclusion that the judgment in the district court must be

AFFIRMED.

STARRY V. KORAB, GARNISHEE.

1. **Garnishment: ESTOPPEL OF GARNISHEE: FACTS NOT AMOUNTING TO.** Where the garnishee, before the execution was issued on which he was garnished, stated to the execution plaintiff that he was indebted to the execution defendant, and that he would withhold payment until he could be served with notice of garnishment, thereby inducing plaintiff to sue out an execution and to have a notice of garnishment served, *held* that the garnishee was not thereby estopped from denying that he was indebted to the execution defendant *at the time he was garnished*. His failure to withhold payment, being, at most, a failure to perform an executory contract, was no ground for an estoppel, and recovery for such breach, if it were possible, could not be had by proceedings in garnishment.

Appeal from Cedar Rapids Superior Court.

MONDAY, DECEMBER 8.

THIS is an appeal from an order in a garnishment proceeding discharging the garnishee. Plaintiff obtained judgment against one Joseph Lustick, on which execution issued, and appellee was garnished as a supposed debtor of the defendant in execution. At the proper time he appeared, and answered that he was not indebted to said Lustick in any sum, and that he did not have any property in his possession belonging to him. Plaintiff filed a pleading controverting this answer, in which it is alleged that, in a conversation had between plaintiff and garnishee before the execution was issued, garnishee stated that he was indebted to Lustick in a certain sum, and that he would not pay the same to Lustick until plaintiff had an opportunity to procure the issuance of an execution on said judgment, and serve notice of garnishment on him thereunder; and that, relying on this representation, and believing it to be true, plaintiff, at great expense and trouble to himself, procured said execution to issue, and caused the garnishee to be served with notice of garnishment thereunder; and that the garnishee is now estopped by his representation and conduct

Starry v. Korab, Garnishee.

from denying that he was indebted to Lustick at the time he was served with the notice. The garnishee demurred to this pleading, on the ground that it did not show that he was in fact indebted to Lustick when the notice of garnishment was served, and that the facts averred in the pleading did not create an estoppel. The demurrer was sustained, and, plaintiff declining to plead further, judgment was entered discharging the garnishee. Plaintiff appeals.

Blake & Hormel, for appellant.

Bowman & Swisher, for appellee.

REED, J.—The purpose of the pleader was undoubtedly to set up in the pleading controverting the answer of the garnishee what is denominated an equitable estoppel. The effect of such estoppel is to preclude the party from asserting a strict legal right, on the ground that his assertion of such right, under the circumstances of the case, would be against equity and good conscience. The pleading assumes that at the time the notice of garnishment was served on the garnishee he was not in fact indebted to Lustick, and that on strict legal grounds he was entitled to be discharged. But the claim is that, having induced plaintiff, by the representation that he *was* indebted to Lustick, to institute the garnishment proceeding and incur the expense and trouble incident thereto, it would be manifestly unjust and inequitable in him to assert his exemption from liability thereon. And the question presented by the record is whether, under the facts stated in the pleading, the garnishee is estopped to deny that he is indebted to Lustick.

It will be observed that the representation on which plaintiff claims to have acted in instituting the garnishment proceedings consisted (1) in the statement of a matter of fact, viz., that the garnishee was at that time indebted to Lustick in a certain amount; and (2) in a promise or agreement as to his conduct in the future, viz., that he would withhold the amount, and not pay it over to Lustick, until plaintiff would

have an opportunity to procure an execution to issue, and notice of garnishment to be served upon him. But it does not appear from the averments of the pleading that the statement as to the matter of fact was not true when it was made; that is, it is not averred that the garnishee was not indebted to Lustick at the time the representation was made. Some time elapsed between the making of the representation and the service of the garnishment notice, and, for anything that appears in the pleading, the garnishee may have been indebted to Lustick at the time of the representation, and have paid the amount to him before the notice was served upon him. If those are the facts, the injury and damages which would result to plaintiff in case of the garnishee's discharge would be occasioned, not by his denial of the truth of his statement that he was indebted to Lustick, but by his failure to perform the agreement to retain in his hands the amount of the indebtedness until the notice of garnishment should be served upon him. But an estoppel does not arise from the mere failure of a party to perform an executory agreement.

The doctrine of estoppel is applied to prevent the injustice which would result if one who has once asserted the existence of a fact, and thereby induced another to act in the belief of the truth of that statement, so as to change his previous position, were permitted afterwards to deny its truth. Under such circumstances, and as against the one who made the statement, the law is that it shall be conclusively presumed to be true. *Pickard v. Sears*, 6 Adol. & E., 469. But it is difficult to conceive a case in which one who is sued for the mere failure to perform an executory agreement would be precluded by the law from making any defense against the claim. It may be that plaintiff has a cause of action against the garnishee on the agreement; but, if so, he clearly cannot enforce it in this proceeding. His remedy in that case must be sought in an original action against the party as defendant. In this proceeding, if he can recover at all, he can do so only by showing either that the garnishee was indebted to

Coffey v. Wilson et al.

the defendant in execution when the notice of garnishment was served on him, or that such a state of facts existed that he is estopped to deny that he was so indebted. The pleading in question, in our opinion, does not show either of these states of fact.

AFFIRMED.

COFFEY V. WILSON ET AL.

1. **Exemption from Execution: FOOD PREPARED FOR BOARDERS.**
Food prepared by a restaurant keeper for his boarders is not exempt from execution. Code, §§ 3072, 3073.
2. **Execution: OPPRESSIVE LEVY: WHAT IS NOT.** The fact that the food levied upon in this case was intended for special use in providing a meal for plaintiff's boarders, and that it did not sell for as much as it would have brought to plaintiff if used in his business as a restaurant keeper, did not render the levy oppressive in such sense that defendants would be liable therefor.
3. ———: **SALE WITHOUT NOTICE: STATUTORY PENALTY.** Where an officer sells property under execution, without notice, for a sum equal to its value, and applies the proceeds on the execution and costs, and the owner sustains no actual damage by reason of the want of notice, he is not entitled to recover the penalty provided by section 3081 of the Code.

Appeal from Linn District Court.

MONDAY, DECEMBER 8.

ACTION upon the official bond given by a constable. There was a judgment upon a verdict for defendants. Plaintiff appeals.

J. B. Young and Stoneman, Rickel & Eastman, for appellant.

Deacon & Smith, for appellees.

BECK, J.—I. The plaintiff was the keeper of a restaurant,

and defendant, Wilson, being a constable, held an execution against him, issued by a justice of the peace.

1. EXEMPTION from execution: food prepared for boarders. The constable levied an execution upon the food prepared for dinner on a certain day by plaintiff for his boarders, and sold it upon the writ, without giving the notice prescribed by the statute. In the first count of the petition plaintiff seeks to recover upon the ground that the property was exempt from execution, and that the levy was oppressive.

II. The district court instructed the jury that, if the food levied upon by defendant was intended and prepared for plaintiff's boarders, it was not exempt from execution. The instruction is correct. The law exempts from execution the necessary provisions for the use of the family of the debtor for six months. Code, § 3072. But the word "family" here used does not include strangers or boarders lodging with the family. Section 3073. The court, therefore, upon this point, rightly instructed the jury.

III. The plaintiff insists that the levy was oppressive, for the reason that the property was absolutely worthless for the purpose of sale. The question of defendant's good faith and the value of the property were properly submitted to the jury by the instructions. The fact that the property was intended for special use in providing a meal for plaintiff's boarders, and that it did not realize, upon the sale, the amount of money it would have brought to plaintiff if used in his business, does not render defendants liable. The instructions given, as applicable to this branch of the case, are correct.

IV. The second count seeks to recover the penalty for sales made by officers without notice, provided by Code, § 3081, which is in this language: "An officer selling without the notice above prescribed shall forfeit one hundred dollars to the defendant in execution, in addition to the actual damages sustained thereby." Plaintiff claims that, the notice required by the

2. EXECUTION: oppressive levy: what is not.

3. ———: sale without notice: statutory penalty.

statute not being given, the constable is liable under this section in this action.

The district court instructed the jury that if they found that the constable sold the property without notice for a sum equal to its value, and applied the proceeds upon the execution and costs, and plaintiff sustained no actual damages by reason of the want of notice, in that case plaintiff is not entitled to recover upon the second count. We think the instruction is correct. The statute declares that plaintiff is entitled to recover the penalty, "in addition to the actual damages sustained" by him. If there be no actual damages the penalty cannot be recovered, for it cannot, in that case, be "in addition to the actual damages sustained." This conclusion is in harmony with justice and the doctrines of the law, which will not inflict a penalty where no wrong has been done, and the party claiming it has suffered no loss or injury. The instructions refused are in conflict with the conclusions we have announced. The evidence gives sufficient support to the verdict.

The foregoing views dispose of all questions in the case.

AFFIRMED.

SWEETZ V. JONES ET AL.

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86 580
65 272
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128 556

1. **Judgment: LIEN ON LEASEHOLD: SALE OF LEASEHOLD ON EXECUTION: EQUITABLE AID.** A judgment is a lien on the debtor's leasehold interest in land, and it follows the leasehold, though conveyed to other persons; (*First Nat. Bank of Davenport v. Bennett*, 40 Iowa, 537;) and such leasehold may be sold upon execution, after conveyance, without the aid of equity; and an action in equity for that purpose cannot be maintained.
2. —: **LIEN ON RIGHT TO PURCHASE LAND.** The right to purchase land at one's option, at a certain price, is not such an interest in land that a judgment against the holder of the option will be a lien thereon.

Appeal from Clay District Court.

• **MONDAY, DECEMBER 8.**

ACTION in equity to establish a judgment lien upon certain land in Clay county. The plaintiff showed in his petition that he holds two judgments, rendered in the circuit court of Clay county, against the defendant, Edward Jones; that Jones, after the rendition of the judgments, was the owner of an interest in the land in question, such interest having been derived from the state of Iowa by reason of a contract with the trustees of the agricultural college, whereby they leased to him the land for the term of ten years, commencing November 13, 1874, with the right, if he so elected, to purchase the same at a designated price. The plaintiff also showed in his petition that Jones sold and assigned the lease to the defendant, Jane Hughes, and that she sold and assigned the same to the defendant, W. J. Davis, and that Davis elected to purchase, and did purchase, under the option given, and has acquired a patent to the land from the state. The plaintiff also showed in his petition that Jones is insolvent. To the petition the defendants, Jane Hughes and W. J. Davis, demurred, and the demurrer was sustained. The plaintiff elected to stand upon his petition, and judgment was rendered against him for costs. He appeals.

Hubbard & Hughes, for appellant.

Parker & Richardson, for appellees.

ADAMS, J.—The plaintiff insists that Jones had two distinct interests in the land upon which his judgments attached as liens, to-wit, his interest as lessee, and his interest existing by reason of the option given him to purchase. For the purpose of the opinion, it may be conceded that his judgments were liens upon the leasehold interest. But we are not able to see how, if this is so, he needed the aid of a court of equity. Where a judgment operates as a lien upon a leasehold interest, all the creditor needs to do is to sell the same upon execution. That such interest may be thus sold was held in *First Nat. Bank of Davenport v. Bennett*, 40 Iowa, 537.

Brett v. Myers.

There is nothing which a court of equity can do to advance the interests of the creditor.

As to the interest said to exist by reason of the option given to Jones to purchase, we have to say that we do not think it such as to constitute a right in the land, and do not think that a judgment lien can attach upon it, or be established by decree. The person holding the right of option is not a purchaser. He becomes such only by exercising his right of option, and not until he becomes a purchaser does he acquire anything which a court of law or equity can recognize. We do not think, indeed, if Jones had had nothing more than a mere right of option not exercised, that it would have been claimed that he had anything that could have been sold upon execution. Now, while it is true that he did have more, yet what he had in addition was a distinct interest, and, as to that, we have seen that the plaintiff did not need the aid of a court of equity. We think that the demurrer was rightfully sustained.

AFFIRMED.

BRETT V. MYERS.

1. **Practice: MOTION TO CANCEL JUDGMENT: AUTHORITY OF COURT.** In the absence of statutory authority, a court has no jurisdiction to cancel a judgment on motion based upon grounds existing prior to its rendition. Section 2867 of the Code does not give such authority.
2. **Appeal to Supreme Court: TRIAL DE NOVO: SUMMARY PROCEEDINGS.** This court has no jurisdiction to try *de novo* a cause prosecuted by summary proceedings.

Appeal from Butler Circuit Court.

MONDAY, DECEMBER 8.

THE defendant, by motion in the circuit court, sought the discharge and cancellation of a decree and judgment rendered

Brett v. Myers.

in this case, which is an action for foreclosure of a mortgage. The motion was overruled. Defendant appeals.

A. F. Brown, for appellant.

Gibson & Dawson, for appellee.

BECK, J.—I. The motion is based upon an agreement and settlement, entered into by the parties before the decree, which defendant insists he performed,—claiming that the decree and judgment should be declared satisfied and be canceled. Counsel for defendant insists that Code, § 2867, confers authority upon the court to entertain the motion. It cannot be claimed that, in the absence of statutory authority, the court has jurisdiction by motion to cancel a judgment. The section cited is clearly not applicable to this case, for it confers authority to discharge a judgment only for matters arising after its rendition. The agreement, which is the foundation of defendant's motion, is a matter which existed before the judgment.

II. But, even should we take cognizance of the case, we could not disturb the decision of the court below. The case, as presented by the motion, is not triable in this court *de novo*. It is a special summary proceeding. Code, §§ 2906, 2506. This court has appellate jurisdiction only in actions in chancery, and it is a court for the correction of errors in all other cases cognizable here. Const., art. 5, § 4. The cause must therefore be considered only upon errors.

The only error assigned is that the decision of the circuit court is in conflict with the evidence. But the testimony is conflicting, and it cannot be held that the judgment is so in conflict therewith that it cannot stand.

AFFIRMED.

HEADINGTON V. LANGLAND ET AL.

1. **Execution: LEVY UPON AND POSSESSION OF PROPERTY BY DEPUTY SHERIFF:** UPON WHOM NOTICE OF CLAIM BY THIRD PERSON TO BE SERVED. Where a deputy sheriff levies an execution upon personal property, and he alone has the actual possession of the property, the notice of ownership by a third person, provided by section 3055 of the Code, may be served on the sheriff,—the deputy being his agent only.
2. **Chattel Mortgage: HUSBAND TO WIFE: VALIDITY: INSTRUCTION.** Where a chattel mortgage made by a husband to his wife (the plaintiff) was assailed by the husband's creditors as being fraudulent, an instruction to the effect that, if the mortgage was executed in good faith, to secure an existing debt, and that if, in taking the mortgage, plaintiff acted with an honest purpose to secure her claim, then she was entitled to recover, *held* correct.

Appeal from Winneshiek Circuit Court.

MONDAY, DECEMBER 8.

ACTION for the recovery of specific personal property. Plaintiff claims the property under a chattel mortgage, executed by her husband, to secure an alleged indebtedness due from him to her.

The property was seized on execution, issued on a judgment against the mortgagor, and in favor of defendants, C. H. and L. J. McCormick.

The defendant, Langland, is sheriff of the county.

It is alleged in the answer that the levy on the property was made by one Sanford, a deputy sheriff, and not by Langland, the sheriff. But the notice of ownership of the property given by defendant was not served on said deputy, but was served on the sheriff.

It is also averred that the mortgage under which plaintiff claims the property was without consideration, and was given for the purpose of defrauding the creditors of the mortgagor.

The verdict and judgment were in favor of plaintiff. Defendants appeal.

Barker Bros. and Brown & Portman, for appellants.

O. J. Clark and J. G. Morse, for appellees.

REED, J.—I. It was admitted on the trial that the property was levied upon by Sanford, a deputy sheriff, on an execution issued on a judgment in favor of C. H. and L. J. McCormick against plaintiff's husband, and that said deputy afterwards sold the property under said levy, and that he had it in his possession during all the time between the levy and sale; and that plaintiff served a written notice of her ownership of the property on the sheriff, while the deputy had it in possession, but gave no notice of her claim to the deputy. Defendants requested the court to instruct the jury that, on this state of facts, plaintiff could not recover. The court refused to give this instruction, but told the jury, in effect, that the service of the notice on the sheriff was a compliance with the requirements of the statute as to notice, and, unless defendants had shown that the mortgage under which she claimed was without consideration, or was given with intent to defraud the creditors of the mortgagor, they should find for plaintiff.

Defendants assign these rulings as error.

It is provided by section 3055 of the Code, that "an officer is bound to levy an execution on any personal property in the possession of, or that he has reason to believe belongs to, the defendant, or on which the plaintiff directs him to levy, unless he has received notice in writing from some other person that such property belongs to him; or if after levy he receives such notice, such officer may release the property, unless a bond is given, as provided in the next section; but the officer shall be protected from all liability by reason of such levy until he receives such notice."

Defendants' position is that the deputy sheriff is an officer, and, as he had the execution in his hands, he was required

by this section to make the levy, unless the notice was served on him personally, and that, having made the levy, and having the property in his possession, it could be released only by the service of the notice on him; and, as he did all that was done in the premises, there could be no liability under the last clause of the section, because of the levy, until he received the notice.

We think, however, that the ruling of the circuit court is correct.

In some sense, it is true, the deputy sheriff is an officer; but in executing a writ or process he acts for the sheriff. His act is the act of the sheriff, and that officer is responsible for what he does. The writ runs to the sheriff, and he is commanded by the statute to execute it. (Code, § 337.) His power in the premises is conferred by the statute. The deputy acts by virtue of his appointment. (Section 766.) He has no original power, but acts as the representative or agent of the sheriff, who is his principal, and who is responsible for the manner in which he performs the duty assigned to him. If a cause of action accrues by reason of the manner in which a writ or process is executed, or the failure to execute it, it accrues in favor of all third parties against the sheriff, and not the deputy, and the latter is responsible alone to the sheriff for his conduct in the performance of the duties intrusted to him. *Brayton v. Towne*, 12 Iowa, 346.

The section of the Code quoted above is intended for the protection of the sheriff. At common law he acted at his peril in levying on the property, if it was claimed by a person other than the defendant in execution. Or if, in consequence of such claim he refused to make the levy, or released the property after levy, he was answerable to the plaintiff in execution, unless he could show that the claim was valid. The section quoted, and those following it, were enacted to relieve the sheriff from the inconvenience and hardship which were sometimes imposed upon him under the rule of the common law. They provide that, in case a written notice of owner-

ship of the property is served by a person other than the execution defendant, the officer may refuse to make the levy, or may discharge the property after levy, if the notice is served after levy, unless the plaintiff gives a bond to indemnify him against all liability to the claimant in consequence of the levy.

As the sheriff is the only person who in any event would be liable to the claimant, the bond, of course, is for his indemnity. And, as the levy is his act, and all the proceedings contemplated by the statute are for his benefit and protection, it follows necessarily, we think, that the service of the notice on him was sufficient.

Such service answered every purpose of the law, as it advised him personally of the claims which plaintiff made to the property, and gave him an opportunity to discharge the property, or procure indemnity against the consequences of the levy.

II. There was evidence tending to prove that plaintiff, at the time of her marriage, was the owner of certain real estate, and that this property was subsequently sold, and that the money derived from the sale thereof was given or loaned to her husband, and was used by him in the purchase of property and the support of his family; and that some years after this, and after the debt now evidenced by the McCormick judgment was contracted, he gave her his notes for an amount considerably in excess of the amount of money originally obtained from her, and, to secure these notes, gave the mortgage under which plaintiff claims the property in question, which, with another mortgage given at the same time, covers all his property, both personal and real;—plaintiff knowing, at the time she took the notes and mortgages, that her husband was indebted to the McCormicks.

2. CHATTEL mortgage: husband to wife: validity: instruction.

The court instructed the jury that “the principal question for you in this case is, was the mortgage in question executed to secure an existing debt, and in good faith? If

Headington v. Langland et al.

so, the plaintiff should recover. If not so, then she should not recover." And in another instruction the jury were told that, if they found that in taking the mortgages plaintiff acted with an honest purpose to secure her claim, she was entitled to their verdict.

Exceptions are taken by the defendants to these instructions. It is urged that an intention by plaintiff to aid her husband in placing his property beyond the reach of his creditors is not altogether inconsistent with an honest purpose on her part to secure her own claim, and that, under these instructions, the jury were warranted in finding for plaintiff, notwithstanding they may have believed that one of her objects in taking the mortgages was to aid her husband in placing his property beyond the reach of his other creditors, if they also found that she intended thereby to secure her own claim. But we think the instructions are not fairly capable of this construction. Plaintiff could not have been actuated by "an honest purpose to secure her claim," if she intended by the same means to aid her husband to cheat or defraud others; and the mortgage could not have been "executed to secure an existing debt," in good faith, if the parties to it intended by that means to place the property covered by it beyond the reach of other creditors. But such fraudulent purposes would be entirely inconsistent with good faith or an honest purpose in the execution of the instrument. Standing alone, then, the instructions are correct.

And, besides this, the jury were told, in other instructions, that if plaintiff intended when she received the mortgage to aid her husband in placing the property beyond the reach of his creditors, this would render the transaction fraudulent as to her, and defeat all claims under the mortgage.

III. It is urged that the verdict is not supported by the evidence.

We have examined the evidence as it is set out in the

Cutler v. Ammon et al.

abstract, and are of opinion that the jury were fully warranted by it in finding as they did.

The judgment of the circuit court is

AFFIRMED.

CUTLER V. AMMON ET AL.

65	281
79	276
65	281
136	517

1. **Vendor's Lien: JUDGMENT: PRIORITY.** The lien of a judgment takes precedence of a prior vendor's lien, where the judgment is taken without notice, actual or constructive, of the vendor's lien.
2. **Equity: LIEN ON TWO FUNDS: MARSHALING ASSETS.** A creditor who has a lien on two funds cannot be required by another creditor, who has a lien on one of the funds only, to exhaust the other fund first, except where it can be done without injustice to him.

Appeal from Winneshiek Circuit Court.

TUESDAY, DECEMBER 9.

ACTION in equity to enforce a vendor's lien. The defendants, John Ammon and George W. Scott, are the owners of certain real estate in Decorah, Winneshiek county, on which the plaintiff holds a vendor's lien for an unpaid balance of purchase money. Since the sale and conveyance, the defendant, Scott, executed upon his undivided half a mortgage to certain creditors, other than the plaintiff, and the defendant, Ammon, confessed judgment in the district court of Winneshiek county in favor of certain other creditors, made defendants hereto, who, it appears, had no knowledge of the vendor's lien. The contest arises as between the plaintiff and the judgment creditors of Ammon, and respects only Ammon's undivided half. The court decreed the plaintiff's lien as vendor inferior to the judgment lien, and refused to decree that the judgment creditors should resort to certain other security before proceeding to enforce their lien upon the real estate in question. The court, also, through oversight or otherwise,

omitted to render judgment against the debtors, Ammon and Scott. The plaintiff appeals.

E. Cutler, for himself.

Willett & Willett, for appellees.

ADAMS, J.—I. The question as to whether a judgment lien takes precedence of a vendor's lien, where the judgment creditors have taken judgment in ignorance of the vendor's lien, appears to be an open one in this state. It was held in *Allen v. Loring*, 34 Iowa, 499, that the lien of an attachment takes precedence of a vendor's lien, where the attaching creditor acquired his lien without notice of the vendor's lien; and in *Gilman v. Dingeman*, 49 Iowa, 311, there is an intimation that the same rule would apply in favor of the holder of a judgment lien. In *Porter v. City of Dubuque*, 20 Iowa, 442, it was said: "The right to a lien in favor of a vendor, upon real estate sold to a vendee, is not based upon contract, nor is it properly an equitable mortgage; neither can it be regarded as a trust resulting to the vendor by reason of the vendee holding the estate with the purchase money unpaid. It is a simple equity raised and administered by courts of chancery."

In *Allen v. Loring* the court, in speaking of the vendor's lien, says: "It is never allowed to override or take priority of equities or rights of third persons which have attached in ignorance of such vendor's lien." In 3 Pom. Eq. Jur., section 1253, the author says: "Whether the grantor's lien is or is not superior to that of subsequent judgments recovered against the grantee, is a question upon which the American decisions are in direct conflict. On principle, however, and especially when considered in connection with the universal system of registry, it seems to me clear that the subsequent judgment liens are entitled to precedence." See, also, *Johnson v. Cawthorn*, 1 Dev. & B., 32; *Roberts v. Rose*, 2 Humph., 145; *Gann v. Chester*, 5 Yerg., 205; *Gilman v.*

Brown, 1 Mason, 192. While we do not regard the question presented as entirely free from doubt, we have to say that we think that the rule which subordinates a vendor's lien to a judgment lien, acquired without notice, is the better rule.

It is said, however, that a contrary rule should be sustained as arising by implication from section 1940 of the Code. That section provides that "no vendor's lien for unpaid purchase money shall be recognized or enforced in any court of law or equity, after conveyance by the vendee, unless such lien is reserved by conveyance, mortgage, or other instrument, duly acknowledged and recorded, or unless such conveyance by the vendee is made after suit brought by the vendor, his executor or assignees, to enforce the lien." The plaintiff's position is that the statute implies that, in the absence of a conveyance, as in this case, the vendor's lien shall be recognized and enforced, and that nothing short of a conveyance should be held even to impair the vendor's right. But in our opinion the plaintiff's position cannot be sustained. The object of the statute appears to be to provide that a grantee of the debtor shall take the land divested of the vendor's lien, even though he takes with knowledge that the purchase money remains unpaid. Where a lien is not expressly reserved in writing, a grantee of the debtor has, under the statute, a right to assume that a vendor's lien, as against such grantee, was waived. It is true that, where there is no conveyance, the lien may be enforced; but we see nothing in the statute which would justify us in holding that, where a lien has been acquired by others upon the land without notice of the vendor's lien, the latter should not be enforced in subordination to the former.

II. But it is said that the judgment creditors have an exclusive right to resort to another fund, and should, under a familiar rule, be required to exhaust that fund before resorting to that upon which the plaintiff relies. The fund to which it is said that the judgment creditors have an exclusive right arises as follows: The judgment debtor, John Ammon, was

executor of the will of G. S. Ammon, deceased. The judgment creditors are devisees under the will. John Ammon, as executor, became indebted to the estate for money collected. Afterwards he gave his note for the money to the devisees, and finally confessed, upon the notes, the judgment in question. The plaintiff insists that it must be presumed that John Ammon was not entitled, under the will, to administer without bond; and that it must be presumed, further, that a bond was given, and that the judgment in question could be collected of the bondsmen. To this we have to say that it appears to us to be doubtful whether we should be justified in presuming that much, in the absence of averment and evidence; and, even if we could, whether the plaintiff's right to have the land subjected to the payment of the indebtedness due him would be superior in equity to the bondsmen's right to have the land subjected to the payment of the indebtedness due the judgment creditors. But we do not consider that these questions are so presented that they call for a determination. It seems to us clear that the court could not properly make a decree upon this point without having the bondsmen before it. No decree which could be now made would conclude them. If, then, we should sustain the plaintiff, we should remit these judgment creditors to what, at best, would be but the chances of litigation, involving a question of personal responsibility, as well as of superior equities. The person who has a claim upon two funds as security cannot be required to exhaust one in preference to the other, except where it can be done without injustice to him. *Clarke v. Bancroft*, 13 Iowa, 320.

III. The plaintiff appears to have been entitled to judgment for the amount of his claim against John Ammon and George W. Scott, who made default, and no reason is suggested why such judgment was not rendered. We think that in this the court erred. The costs of the appeal will be taxed to the defendant debtors, Ammon and Scott.

MODIFIED AND AFFIRMED.

PRESTON V. JOHNSON.

1. **DIVORCE: WIFE AGAINST HUSBAND: DISMISSAL OF ACTION: LIABILITY OF HUSBAND FOR ATTORNEY'S FEES.** Where a wife employs an attorney to begin an action for divorce against her husband, and the attorney begins such action in good faith, upon the wife's verified statement of facts which, if true, would entitle her to a divorce, and the action is afterwards dismissed, *held* that the attorney may recover his fees of the husband, without proving that the wife was in fact entitled to a divorce.

Appeal from Linn Circuit Court.

TUESDAY, DECEMBER 9.

THE plaintiff is a lawyer, and commenced an action against the defendant for divorce. The defendant's wife was plaintiff in the action, which was dismissed by the parties thereto. This action was brought to recover for services rendered in the divorce proceeding. Trial by jury, judgment for the plaintiff, and defendant appeals.

Stoneman, Rickel & Eastman, for appellant.

Preston Bros., for appellee.

SEEVERS, J.—I. The amount claimed in the pleadings being less than \$100, the trial judge has certified the following questions to be determined by this court: "In an action at law against a husband, on an implied promise to pay for professional services rendered for his wife in an action by her for divorce, does the necessity for such services, or the implied promise therefrom by the husband to pay for same, arise, when the verified allegations of the wife, with sufficient corroborating testimony of others, would, without conflicting testimony, entitle the wife to a divorce? or, to establish such necessity for professional services on the implied promise to pay for same by the husband, is it required that the truth of the allegations, sufficient to entitle the wife

65	285
78	468
78	470
78	696

65	285
di 40	381

to a decree, must be established by a preponderance of the testimony?"

Counsel for the appellant insist that an implied promise on the part of the husband to pay for the services of an attorney employed by his wife to prosecute an action for divorce does not arise under the circumstances stated in the foregoing question. To this counsel for the appellee responds that no such question is presented by the record; and this, we think, is so. It is assumed in the question propounded that an implied liability is imposed on the husband to pay an attorney employed by his wife to prosecute an action for a divorce. We are simply asked whether the necessity for the services of the attorney would arise under the facts stated in the question. This proposition must be answered in the affirmative. We think, conceding the facts stated in the question propounded to be true, that a *prima facie* case for a divorce would be made out, which would justify an attorney in instituting the action. The necessity for his services would then arise.

II. The question under consideration seems to embrace this further proposition: whether the plaintiff in this case, in order to recover, must establish that the defendant's wife, in the action for a divorce, was entitled to a decree. In other words, the proposition is whether the attorney who commences an action for a divorce for a wife against her husband is bound to establish, before he can recover from the husband for his services, that the wife was entitled to a divorce. This question must be answered in the negative.

Conceding, as we must, that there is an implied liability imposed on the husband, we think that the attorney is entitled to recover for his services, when he acts in good faith, and there is no evidence of collusion, or that the action was brought for the purpose of oppression, and not to vindicate a right.

AFFIRMED.

Carter v. The Kansas City, St. Joseph and Council Bluffs R'y Co.

CARTER V. THE KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS
RAILWAY COMPANY.

65	287
78	593
65	287
124	174

1. **Negligence: PLEADING: EVIDENCE.** Where plaintiff averred negligence of one kind, it was erroneous to permit him, over defendant's objection, to introduce testimony as to negligence of a different kind, not referred to in the petition.
2. **Railroads: FIRES FROM ENGINE: MEANS USED TO PREVENT: EVIDENCE.** Where defendant was charged with negligence in the construction and use of a locomotive, whereby damage by fire resulted to plaintiff, it should have been allowed to show why a netting finer than the one actually used by it to prevent the escape of sparks could not be used without interfering with the working capacity of the locomotive.

Appeal from Shelby District Court.

TUESDAY, DECEMBER 9.

ACTION for damages sustained by a fire alleged to have been set out by the defendant. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

Sapp & Pusey, for appellant.

P. P. Kelley and Macy & Gammon, for appellee.

ADAMS, J.—I. The plaintiff averred in his petition that the defendant's "freight train was so carelessly and negligently managed and operated that the sparks from the engine set fire to and burned ninety tons of hay," etc. On trial, the evidence tended strongly, if not conclusively, to show that the fire was not set out by reason of any defect in the appliances used, or by reason of any negligence of the defendant in the manner in which the train was managed or operated. But the plaintiff was allowed to introduce evidence tending to show that defendant was guilty of negligence in allowing dry grass and other combustible material to accumulate on the right of way, and that a spark, though perhaps escaping without

1. NEGLIGENCE:
pleading: evidence.

Carter v. The Kansas City, St. Joseph & Council Bluffs R'y Co.

the negligence of the defendant, set fire to the combustible material negligently left on the right of way. The defendant objected to the introduction of such evidence, but the objection was overruled, and the overruling of the objection and admission of the evidence are assigned as error.

Whether it was necessary for the plaintiff to aver that the defendant was guilty of negligence, and, if so, whether it was necessary for him to aver in what the negligence consisted, we need not determine. Having averred negligence, and in what the negligence consisted, we think that the plaintiff should not have been allowed to show other negligence. The defendant, it seems to us, was justified in assuming that the issue was not broader than that which the plaintiff, by his express averments, had seen fit to tender. If we should hold that the plaintiff might aver one kind of negligence and prove another, we should not only hold, in effect, that the averment had no significance, but that it was allowable for the plaintiff to so frame his petition that it should be well calculated to deceive and mislead the defendant. In allowing the evidence as to combustible material in the right of way, we think that the court erred. As tending to support our view, see *Denton v. Chicago, R. I. & P. R. Co.* 52 Iowa, 161.

II. The evidence showed that the defendant, to prevent the escape of sparks, used a cone and netting, but that such appliances, though useful, were not effectual to prevent the escape of sparks entirely. For the purpose of showing that the defendant was not negligent, notwithstanding the escape of sparks, it asked its engineer a question in these words: "Now, suppose that there was a netting of much smaller mesh used over the smoke-stack, and a larger cone,—one that would more obstruct the stack, what effect would that have upon the draft of the engine, if any—upon its capacity to perform its work?" This question was objected to by the plaintiff, and the objection was sustained. As a netting might doubtless have been used with so small a mesh as to prevent all escape of sparks,

2. RAILROADS:
fires from en-
gine: means
used to pre-
vent: evi-
dence.

The State v. Helvin.

and as such fact must have been obvious to the jury, and probably present to their mind, we think, that the defendant should have been allowed to show why such netting could not properly be used.

Some other questions are presented, but, as they may not arise upon another trial, and as we might not be agreed in relation to them, we omit to consider them.

REVERSED.

THE STATE V. HELVIN.

1. **Criminal Law: PRELIMINARY EXAMINATION: FILING MINUTES WITH CLERK.** Section 4289 of the Code does not require the minutes of a preliminary examination to be filed with the clerk of the district court, in a case where the defendant is discharged upon such examination.
2. ———: **ROBBERY: COINS: EVIDENCE OF VALUE.** Where the indictment alleged the taking of certain gold and silver coins, and the person robbed testified that he was robbed of \$245 in gold, mostly in twenty-dollar gold pieces, but partly in five and ten-dollar gold pieces, and of \$45 or \$50 in silver dollars, *held* that this was sufficient evidence of the genuineness and value of the coins.
3. **Instructions: REPETITION NOT REQUIRED.** It is not error to refuse to give an instruction asked, when the same ground has been fully covered by an instruction given.
4. ———: **FULLNESS OF REQUIRED IN CRIMINAL CASE.** The instructions in this case being correct so far as they went, and defendant not having asked for fuller instructions, as it does not appear that he was deprived of a fair trial by their brevity, he cannot demand a reversal on account thereof.
5. **Criminal Law: MEASURE OF PUNISHMENT: REVIEW OF IN SUPREME COURT.** A criminal sentence will not be mitigated in this court where no abuse of discretion is shown on the part of the trial court.

Appeal from Marion District Court.

TUESDAY, DECEMBER 9.

THE defendant was tried upon a charge of robbery. Ver-
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65	289
81	308
65	289
89	309
65	289
100	229
65	289
103	483
65	289
108	72
65	289
109	117
65	289
127	327

dict and judgment were rendered against him, and he appeals to this court.

L. Kinkead, for appellant.

Smith McPherson, Attorney-general, for the State.

ADAMS, J.—I. The defendant contends that the indictment should have been set aside because not found upon the testimony of witnesses examined before the grand jury, but only upon the minutes of testimony taken upon the preliminary examination, which examination resulted in the defendant's discharge. The indictment purports to have been found upon the testimony of witnesses examined before the grand jury, and we have not discovered any sufficient evidence that it was not so found. Besides, this point does not appear to have been made below, either by motion for a new trial, in arrest of judgment, or otherwise.

II. It is further objected that the minutes upon the preliminary examination were not filed with the clerk. Our attention is called to sections 4289 and 4293 of the Code; but the latter refers to minutes of testimony upon which the indictment is found, and the former to minutes of testimony taken upon the preliminary examination, where the defendant is held to answer. In this case the defendant, upon such examination, was discharged.

III. The defendant insists that none of the witnesses examined in behalf of the state upon the trial were examined before the grand jury, and that no notice was given that such witnesses would be called. But their names are indorsed upon the back of the indictment as those who were examined before the grand jury.

IV. The robbery is alleged to have consisted in taking from the person of one Wagner certain gold coins and silver coins. It is insisted that the evidence failed to show that they were genuine, and failed to show their value. The person robbed testified that he

1. CRIMINAL
law: prelim-
inary exami-
nation: filing
minutes with
clerk.

2. ———: rob-
bery: coins:
evidence of
value.

was robbed of \$245 in gold, mostly in twenty-dollar gold pieces, but partly in ten and five-dollar pieces. He also testified that he was robbed of \$45 or \$50 in silver dollars. In our opinion this is sufficient. The fair meaning of the testimony is that the witness was robbed of gold and silver coins of the denomination and value above mentioned.

V. The defendant complains of the insufficiency of the instructions. He insists that, at most, the evidence established only a probability of guilt, and that the jury should have been instructed "that the evidence should be of that certain character as to prove guilt so clearly and conclusively as to destroy every reasonable theory upon which the defendant could be innocent." The instruction given by the court upon this point is in these words: "Before you will be justified in convicting the defendant, you must be satisfied of his guilt beyond a reasonable doubt." The instruction given is in the unusual form, and, in our opinion, covered the ground fully.

3. INSTRUCTIONS: repetition not required.

VI. The defendant complains of the insufficiency of the instructions in other respects. But we have to say that they seem to be correct as far as they went. If the defendant desired further instructions he should have asked them. It is true, we might reverse in a criminal case for mere failure to instruct, if we should be satisfied that such failure resulted in depriving the defendant of a fair trial. But we are not thus satisfied in this case.

4. —: fullness of required in criminal case.

VII. The defendant asks us to reduce the judgment on the ground that it is excessive. He was sentenced to the penitentiary for eight years. It is said that the court was influenced by improper considerations, as shown by the language used at the time the sentence was pronounced. As to this we have to say that we have no proper evidence that the court used the language attributed, and no proper evidence that the language was not justified, if used. Besides, the punishment is less

5. CRIMINAL law: measure of punishment: review of in supreme court.

Summers v. Barrett et al.

than might have been inflicted, even aside from the considerations from which it is said the court acted. We see no abuse of discretion, and cannot interfere.

Some other objections were raised in the motion for a new trial. As to these we must be allowed to say that we have examined the entire record, and find no error.

AFFIRMED.

SUMMERS V. BARRETT ET AL.

1. **Promissory Note:** GUARANTY OF COLLECTION: LIABILITY OF GUARANTOR. Where C. had indorsed upon a promissory note, payable to bearer, a guaranty of *payment*, with waiver of notice, and afterwards defendant indorsed thereon a guaranty of *collection*, and both of these guaranties were on the note when it became the property of plaintiff, *held* that plaintiff could not recover thereon against the defendant, without showing that he had used reasonable diligence to collect the note from both the maker and the first guarantor, unless he showed some legal excuse for his neglect to use such diligence.

Appeal from Winneshiek District Court.

TUESDAY, DECEMBER 9.

ACTION against the guarantor of a promissory note. There was a judgment upon a verdict for defendant. Plaintiff appeals.

L. Bullis, for appellant.

No appearance for appellee.

BECK, J.—I. One Andrews executed his promissory note, payable to plaintiff or bearer. Clark, by indorsement, guaranteed the payment of the note, and waived notice. Subsequently Barrett, by indorsement, guaranteed the *collection* of the note. This action is against Barrett alone. There was evidence tending to show that at and since the maturity

of the note Adams was and has been insolvent, and a non-resident of the state; but there is no evidence of the insolvency or non-residence of Clark. The court below gave to the jury the following instruction: "It is admitted by the plaintiff, on the stand as a witness, that both of these written guarantees were on the note, duly signed, when the note was delivered to him by the maker, Charley Adams; and the uncontradicted evidence is that John T. Clark signed his guaranty of payment before the defendant signed his guaranty of collection. Such being the fact, the plaintiff cannot recover of this defendant on his guaranty of collection, unless he, the plaintiff, shows that he has used reasonable diligence to collect the note from both Adams, the maker, and Clark, by legal proceedings, or unless he shows some legal excuse for his neglect to use such diligence. It is more than eight years since the note matured, and there is no evidence before you that the plaintiff has made an effort to enforce collection against said Clark, nor is there any evidence before you of any legal excuse for this neglect. You will therefore return a verdict for the defendant."

These instructions, we think, are correct. The guaranty of defendant was for the collection of the note, and related to it as it was when he became guarantor. He became bound to pay it in case it could not be collected by reasonable diligence. As Clark was bound to pay the note by his guaranty, defendant's contract related to the liability of Clark as well as of Adams. Defendant became liable only in case the note was not paid by either Adams or Clark, after proper diligence was used by plaintiff to collect it from both. This is the obvious effect of defendant's guaranty. The plaintiff, by showing Adams' insolvency and non-residence, excused want of effort to collect from him. This is contemplated in the court's instruction. But no excuse is shown for neglect to use diligence to collect the note from Clark. Plaintiff, therefore, cannot recover of defendant. The instructions above set out are correct, and those asked

 Thode, Guardian, v. Spofford et al.

by plaintiff, being in conflict therewith, were properly refused. In support of our conclusion as to the effect of the guaranty for the collection of the note, see *Peck v. Frink*, 10 Iowa, 193; *Voorhies v. Atlee*, 29 Iowa, 49. The evidence gives sufficient support to the verdict. The foregoing views dispose of all questions in the case.

The judgment of the district court is

AFFIRMED.

THODE, GUARDIAN, v. SPOFFORD ET AL. (Two cases.)

1. **Landlord and Tenant: HUSBAND LEASING LAND OF INSANE WIFE.**
Persons renting of a husband land belonging to his insane wife will be regarded as tenants of the wife.
2. **Tax Title: RECOVERY OF LAND UNDER: STATUTE OF LIMITATIONS.**
Under § 790 of the Revision of 1860, an action upon a tax title, to recover the possession of land from the holder of the patent title, was barred after five years from the date when the tax deed could have been procured.
3. **Landlord and Tenant: ACQUIRING ADVERSE TAX TITLE BY TENANT.**
Tenants are bound to know that their possession is the possession of their landlord, and that such possession for more than five years after a tax title accrues bars all rights of the holder of the tax title to the possession of the premises, and they cannot, by taking a warranty deed from the holder of the tax title, after it is so barred, claim anything, as innocent purchasers, against their landlord.
4. **Husband of Insane Wife: POWER TO DISPOSE OF REAL ESTATE.**
The husband of an insane wife has no power to divest her of an interest in real estate.
5. **Jurisdiction: OF ACTION BY CROSS-BILL AGAINST CO-DEFENDANT: NOTICE NECESSARY.** Where a defendant sets up a cause of action by cross-bill against his co-defendant, notice of such action must be served upon the co-defendant, in order to give the court jurisdiction to render judgment against him on the cross-bill. Code, § 2663. *Devin v. City of Ottumwa*, 53 Iowa, 461, distinguished.
6. **Judgment: FOR DEFENDANT AGAINST CO-DEFENDANT, WITHOUT NOTICE, ON COMPROMISE WITH PLAINTIFF: CO-DEFENDANT NOT BOUND BY COMPROMISE.** Where a county sought to subject the property of an insane woman to the payment of expenses incurred in

66	294
78	106
65	294
82	561
65	294
91	633
65	294
136	725
136	726

her behalf in the hospital, and made S. a party thereto, on account of his holding a tax title on the land, and he paid the demand of the county, without judgment therefor, in consideration that he might be allowed to have the title quieted in him, as prayed in a cross-bill, of which his co-defendant, the woman, had no notice, *held* that such payment by him was purely voluntary, and that her guardian was under no obligation to reimburse him therefor as a condition of redeeming the land from the tax title.

7. **Tax Sale: REDEMPTION FROM: AMOUNT TO BE PAID: STATUTE OF LIMITATIONS.** One who has the right to redeem from a tax sale must pay all taxes paid by the purchaser within five years prior to the commencement of the suit to redeem, with interest and penalties provided by law; but the right of recovery for all sums paid before that time by the purchaser for taxes and upon tax sales is barred by the statute of limitations, and need not be paid in redemption.
8. ———: **PAYMENT OF SUBSEQUENT TAXES BY PURCHASER: FILING DUPLICATE RECEIPT WITH AUDITOR: CODE, § 839.** The provision of § 839 of the Code, requiring a purchaser at tax sale, upon paying subsequent taxes, to file with the auditor the duplicate tax receipt, in order to recover the tax upon redemption of the land, does not apply to one who has procured his tax deed, and pays taxes on the land as owner thereof.
9. **Insane: CLAIM OF COUNTY FOR SUPPORT OF: LIEN ON LAND.** Under § 1433 of the Revision, and § 1433 of the Code, a county has no lien, without judgment, upon the real estate of an insane person for expense incurred on account of such person in the hospital.

Appeal from Polk Circuit Court.

TUESDAY, DECEMBER 9.

ACTIONS in chancery to set aside certain tax sales of real property and deeds made thereon; to quiet title, and for other relief. There was a decree granting the relief prayed for by plaintiff, upon payment of certain sums which the circuit court found the plaintiff ought to pay to entitle him to redeem the property. Both parties appeal. The cases involve the same facts and questions of law, and they are submitted together for one decision.

H. W. Maxwell and *William Phillips*, for plaintiff.

Brown & Dudley, for defendant.

BECK, J.—I. The property involved in these suits is a

part of two lots in the city of Des Moines. The east half of the property is involved in one suit, and the west half in the other. The title to each involves the same questions of fact and law, and need not be separately referred to in the discussion of the case.

The plaintiff is the guardian of his insane mother, Helen Thode, who holds the title of the property, unless it be divested by certain tax sales and deeds, and an alleged adjudication, upon which defendants base their respective titles.

Defendants claim title under several tax sales and deeds, some of them for city and the others for state and county taxes. The tax deeds were all made to defendant, Spofford, and the last one was executed July 10th, 1874, upon a sale for taxes made Oct. 3, 1866. The other deeds were made upon prior sales.

The property formerly belonged to John H. Thode, and was conveyed by him in 1863 to J. H. Phillips, who immediately conveyed it to Helen Thode, wife of J. H. Thode, and now plaintiff's ward. It is alleged in the answers of defendants that these conveyances were made for the fraudulent purpose of defrauding the creditors of John H. Thode. We find that this allegation is not sustained by the proof.

J. H. Thode leased the separate lots claimed by the respective defendants, Stowe and Bird, to them, and each went into possession under his lease, which, in each case, granted a term for five years. Stowe's lease was executed August 16, 1870; Bird's on the 22d of May, 1871. Each of the defendants paid rent to Thode until October, 1874; after that date, to Spofford, who conveyed to Stowe the property claimed by him, November 2, 1875, and conveyed to Bird the other part of the lot May 31, 1877. Thode assigned the lease executed by Stowe to Spofford, October 1, 1874. Helena Thode, the wife of J. H. Thode, was, in proper proceeding in the county court of Polk county, on the thirteenth day of February, 1866, declared insane, and an order was made directing her to be sent to the hospital for the insane at Mount Pleasant, and

she was taken to that institution, and kept there, under this order, for a number of years. The printed abstract sometimes gives her name as *Helen*, and sometimes as *Helena*, a discrepancy doubtless resulting from careless proof reading. April 29, 1880, the husband was appointed guardian for Mrs. Thode.

The leases to defendants and the assignment of the Stowe lease to Spofford were not executed by Thode as guardian for his wife, nor is she or her interest in the property referred to in these writings.

II. The defendants, Stowe and Bird, held the respective lots as tenants until they purchased of Spofford. While they rented of her husband, the law will regard them as the tenants and Mrs. Thode the owner of the property. We need not inquire into the effect of the assignment of the lease of Stowe to Spofford.

III. As we have seen, the most recent tax sale, under which Spofford claimed title, was made October 3, 1868. At the expiration of three years from the date of the sale, the purchaser at the tax sale was entitled to a deed, (Rev. § § 779, 781,) and at the expiration of five years from the date when the tax deed could have been issued, the right of the holder of the tax title was barred, and he could not have recovered the possession of the land in an action against the tax payer. Rev., § 790; *Hintrager v. Hennesey*, 46 Iowa, 600. October 3, 1874, the owner of the property, if she was in possession, was entitled to hold it against the tax title. When defendants, Stowe and Bird, purchased the lots and took conveyances from Spofford, his right of action under the tax deeds was barred. The defendants were tenants holding under the owner of the property, Mrs. Thode, and cannot gain protection as innocent purchasers under the deed of warranty executed to them by Spofford. They were bound to know that Mrs. Thode, though insane, held possession of the lots, and they had, therefore, notice that, when Spofford con-

1. LANDLORD
and tenant :
husband leas-
ing land of
insane wife.

2. TAX title :
recovery of
land under :
statute of lim-
itations.

3. LANDLORD
and tenant :
acquiring ad-
verse tax title
by tenant.

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veyed to them, his right of action was barred by the statute, for they are presumed to be informed of the provisions of the law whereon the rights of their landlord to the property depended. They were charged, too, with notice of Spofford's title—that it rested upon tax sales. They therefore purchased the property with full notice of the infirmity in the title resulting from the possession of Mrs. Thode, and the bar of the statute based thereon. See *The Keokuk & Des Moines Ry Co. v. Lindley*, 48 Iowa, 11.

The defendants gained nothing from the assignment of the lease by Thode and other acts done by him, intended to surrender the property and right thereto. These acts do not bind Mrs. Thode, who, when they were done, was insane. Indeed, if she had not been insane, they would not divest her right to the property, unless done by her authority and nothing of the kind is attempted to be shown in this case.

IV. In 1874 the auditor of Polk county brought an action against Helen Thode to recover the amount paid by the county for her support while at the insane hospital. The petition alleges that she is the owner of the property in controversy in this suit, and it seeks to charge the same with the amount due the county. Spofford is made a defendant in the action, on the ground that he is the holder of a tax title on the property. A guardian *ad litem* was appointed by the court for Mrs. Thode, after service of notice on her as required by the statute, who answered this petition, denying all the allegations thereof. Spofford answered the petition, denying the allegations thereof, and setting up his tax titles, and averring that thereby he acquired the title of the property. The answer prays that Spofford may be declared to hold the title to the property as against Mrs. Thode, and that it be quieted in him. No notice or process of any kind was issued against the guardian *ad litem* or Mrs. Thode, and no appearance or answer was made to this answer of Spofford. A decree was entered

4. HUSBAND
of insane
wife: power
to dispose of
real estate.

5. JURISDIC-
TION: of ac-
tion by cross-
bill against
co-defendant:
notice neces-
sary.

Thode, Guardian, v. Spofford et al.

against Mrs. Thode in favor of Spofford, declaring that his tax titles are valid, and quieting the title in him. No judgment was entered against her in favor of the plaintiff in the action.

This decree is now pleaded by Spofford and the other defendants as an adjudication binding plaintiff. It can have no such effect. If Spofford's answer be regarded as a cross-bill against Mrs. Thode, she was not required to answer it without notice. It set up a cause of action against her independent of the action of plaintiff. It was, indeed, an action between her and Spofford, of which she could have no notice from the process served upon her by plaintiff. In such cases, the law always has been that defendants to cross-bills or cross-actions brought by co-defendants must be served with notice of the claims made against them. This is the rule of our statute. Code, § 2663. In the absence of such notice, the court has no jurisdiction to render judgment against Mrs. Thode.

Devin v. The City of Ottumwa, 53 Iowa, 461, is not inconsistent with the conclusion we have reached upon this point. In that case the defendants set up conflicting titles and claims to the land in controversy, but did not claim relief, the one against the other. It is not shown that the respective defendants did not have notice of the claim of title made by the co-defendants. The decision is based upon the ground that the title was put in issue by the pleadings of the respective defendants, and, being so in issue, the decree quieting the title as to one would not be erroneous, for the reason that no direct claim for relief was made against the defendant appealing. As the question of title was an issue raised by the pleadings, there was no want of jurisdiction on the ground that no notice was served, for the reason that the appearance and pleading by the respective parties waived the necessity of process against them. In this case, the title of the property was not put in issue by the pleadings, so far as Mrs. Thode was concerned, for her guardian *ad litem* makes no

Thode, Guardian, v. Spofford et al.

avermert or statement in regard to the title. There being no issue involving the title between defendant Spofford, and the guardian *ad litem*, and no notice having been served as required by law, the decree is void, and cannot be regarded as an adjudication.

We reach the conclusion that the title of the property is in plaintiff's ward, and that he is entitled to recover in this action, and that the title ought to be quieted in Mrs. Thode.

V. We are required to determine what sum plaintiff shall pay to redeem from the tax sales and taxes paid by defend-

6. JUDGMENT:
for defendant
against co-def-
endant, with-
out notice, on
compromise
with plaintiff:
co-defendant
not bound by
compromise.

ants. The court below, by its decree, required plaintiff to pay the sum of \$1,500, and interest thereon, paid by Spofford to Polk county in discharge of its claim against Mrs. Thode. That sum, it appears by the evidence, was paid by Spofford in the way of a settlement or compromise, on condition that he should have a decree against Mrs. Thode quieting the title to the lots in him. As we have said, there was no adjudication upon the claim against the insane woman,—no judgment rendered against her. We cannot understand upon what ground Spofford made the payment, other than that he was thereby enabled to obtain the decree granting him the relief he sought. There is no adjudication that Mrs. Thode's estate was liable to the county in any amount which could be enforced against the lots. The payment by Spofford was wholly voluntary. Surely he cannot come into a court of equity seeking relief in the form of a judgment against the insane woman, on the ground that, while she was insane, he paid \$1,500 for the purpose of inducing a judgment against her, which we find to be void for want of jurisdiction in the court rendering it. His attempted purchase of a judgment in that way gives him no ground to recover now from the guardian the sum he unwisely expended.

VI. The defendants may recover in this action for all taxes paid by them within five years prior to the commence-

7. TAX sale: redemption from: amount to be paid: statute of limitations. ment of this suit, with interest and penalties provided by law in case of redemption from tax sales. All sums paid by them for taxes and upon the tax sales before that time are barred by the statute of limitations. *Brown v. Painter*, 44 Iowa, 368.

8. ———: payment of subsequent taxes: filing duplicate receipt: code, § 889. While we would not enforce a lien upon the land for taxes paid by the holder of a tax sale certificate, unless the statute requiring the tax receipts to be filed with the auditor be complied with, we think the provision of the statute does not apply to cases where tax deeds have been executed, and the holder thereof pays as the owner of the land. See Code, § 889. *Kennedy v. Bigelow*, 43 Iowa, 74. We have held in *Everett v. Beebe*, 37 Iowa, 452, and cases following that decision, that, when there has been a valid levy and assessment of taxes, we will, when redemption is sought, require it to be done upon payment of a sum sufficient to pay all taxes, if they had not been paid by the purchaser at the tax sale.

The evidence shows that payments amounting to \$150 were made upon the taxes many years ago. This sum will not be deducted from the amount for which defendants are entitled to recover on account of taxes paid by them. The payments were made upon taxes, the recovery of which we hold is barred by the statute of limitations. They ought not to be deducted from taxes the recovery of which is not barred.

VII. We think the decree of the court below touching the value of the improvements, and the rental value of the lots, is substantially correct and in accord with the testimony. We have discovered no ground for changing them.

VIII. The cause will be remanded to the circuit court for a decree in accord with this opinion, which shall authorize plaintiffs to redeem within eight months from the rendition of the decree, upon payment of the amounts found due on account of taxes paid and improvements made, less the rental value of the property, at the date found by the decree of the court appealed from up to the day of redemption. Other

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provisions in the decree appealed from, not in conflict with this opinion, will be incorporated in the new decree. The defendants will pay the costs of the appeal.

REVERSED ON PLAINTIFF'S APPEAL.

AFFIRMED ON DEFENDANTS' APPEAL.

• SUPPLEMENTAL OPINION.

PER CURIAM. A petition for a rehearing was entertained in this case upon two questions: *First*, as to the right of appellees to be reimbursed for the amount paid by Spofford on the claim of the county for keeping Mrs. Thode in the insane hospital; *Second*, as to the right of appellees to be reimbursed for the amount of taxes paid, other than those paid within five years. As to the \$1,500 paid to the county, it is important to remember that Bird and Stowe are not entitled to any relief except such as inured to Spofford. His most recent tax title was barred October 3, 1874. All payments of taxes by him after that time were not based upon any tax title. They were not payments made to protect any interest he had in the lots, for the very obvious reason that he had no interest to protect. When the action was brought by the county, if he had any right to any relief, it was that he might be reimbursed for any taxes that he had paid, upon the ground that there was an implied contract for reimbursement, or that the payment was necessary to protect some lien he had upon the property. He was not satisfied with this, but asserted title against Mrs. Thode, and took a decree against her, which was void for want of jurisdiction. To obtain this decree he paid the county \$1,500. The claim of the county was not a lien upon the property. Counsel claim

9. INSANE: that under section 1433 of the Code, and 1488 of
claim of
county for
support of;
lien on land. the Revision of 1860, the claim of the county
became a lien from the commencement of the
suit by the county Those sections make no provisions for a
lien, either before suit commenced or afterwards. They sim-

Ellsworth v. Cordrey.

ply provide that the support of the insane at public expense shall not be construed to release the estate of such persons from liability for their support; and counties are authorized to collect from the property of patients any sum paid by the county in their behalf. The collection is to be made, like any other claim, by action, judgment and execution; and there is no lien until it is obtained by the judgment of the court. The payment by Spofford was, therefore, purely voluntary. He should have been content with asserting his rights in that action, which, as we have said before, consisted in reimbursement for taxes paid, if he had even the right to that relief.

II. As to the taxes paid more than five years previous to the commencement of the suit, we have little to add in addition to what is said in the foregoing opinion. These taxes were paid at a time when Bird and Stowe were in possession under their leases. Mrs. Thode was then insane. There is no claim that they were made to protect her title. On the contrary, they were payments made with the purpose of depriving her of her title, and we are not inclined to think that there is any equity in the claim for these taxes which should overreach the statute of limitations.

The former opinion is adhered to.

ELLSWORTH V. CORDREY.

1. **Tax Sale and Deed: NOTICE TO REDEEM: PRESUMPTION THAT LAND IS TAXED TO OWNER.** Where defendant's title to the land in question was of record, and the land was assessed and taxed to him at the time it was sold for taxes, it will be presumed, in the absence of a contrary showing, that he retained the title and that it was taxed to him when the notice to redeem should have been given; and especially should such presumption be entertained against a holder of the certificate of purchase who, by his acts in the premises, recognized the continued ownership of the defendant. In such case a tax deed cannot be sustained without the statutory proof that notice to redeem was served on defendant. *Fuller v. Armstrong*, 53 Iowa, 683, distinguished.

Appeal from Hardin Circuit Court.

TUESDAY, DECEMBER 9.

*S. M. Weaver and T. H. Milner, for plaintiff.**Brown & Carney, for defendant.*

OPINION ON REHEARING.*

ROTHROCK, CH. J.—I. This cause has again been submitted to us on a petition for a rehearing. It is urged that the evidence in the case does not show that the land was taxed to the defendant when the notice was served, and that as to the forty-acre tract sold to Zelig no notice was necessary; and the case of *Fuller v. Armstrong*, 53 Iowa, 683, is relied upon as supporting the claim made. The abstract shows that the land was assessed and taxed to the defendant in 1875, the year for which it was sold for taxes. It also appears that the defendant's title to the land was then of record. The plaintiff seeks to quiet his tax title. If the land was taxed to the defendant, it was incumbent on the plaintiff to give the notice required by law. This he attempted to do, but the notice was insufficient. It being conceded that the patent title to the land was in the defendant, and that the same was taxed to him in 1875, it should be presumed that no change was made in the ownership, and in the name in which it was taxed. Especially should this be so in view of the fact that the plaintiff attempted to give notice to defendant, and obtained his tax deed by a showing that he had given notice, and in view of the further fact that he seeks by this action to quiet his title as against the defendant. This is an admission that the defendant is the owner of the patent title, and if there was no change of title it is fair to presume that no change was made in the name in which the land was taxed.

* For original opinion see 63 Iowa, 675.

II. It is further claimed that the tax title should be sustained as to the forty-acre tract purchased by Parmlee, because the agency of McKay was in no manner connected with Parmlee's purchase. But the evidence shows that McKay paid the tax upon the land for 1876 with money furnished by the defendant, and he sent the defendant a receipt, and did not notify him that the land had been sold for the tax of 1875. He should have applied the money in redemption from the sale, and we do not think that under the facts in the case he could acquire any rights in the Parmlee tract by afterwards taking an assignment of the certificate of purchase. The former opinion is adhered to.

THE STATE V. LESLIE.

1. **Appeal to Supreme Court: CRIMINAL CASE: DEFICIENT RECORD.**

The record in this case showing no notice of an appeal, and being otherwise defective, the judgment of conviction for manslaughter cannot be disturbed.

Appeal from Cass District Court.

TUESDAY, DECEMBER 9.

THE defendant was indicted and convicted for the crime of manslaughter, and was sentenced to imprisonment in the penitentiary for three months, and to pay a fine of \$500. She appeals.

No appearance for appellant.

Smith McPherson, Attorney-general, for the State.

ROTHROCK, CH. J.—The cause is submitted to us upon a transcript, without either abstract or argument, and the attorney-general, in a written motion, calls our attention to some questions pertaining to the sufficiency of the record. The

Riley v. Norton.

defendant was jointly indicted with her husband for causing the death of defendant's mother, a very aged and feeble woman, and a member of defendant's family. It was charged that the deceased came to her death by reason of the neglect and cruel treatment of the defendant and her husband. The trial was had in February, 1882. Time was taken until the next term to move for a new trial. A motion for a new trial was overruled in September, 1883.

The translation of the short-hand reporter's notes of the evidence was not filed in the office of the clerk of the district court until January 25, 1884. No time was taken to settle a bill of exceptions, and the only authentication of the evidence is a certificate of the trial judge attached to the translation of the evidence. The certificate is without any date. There is no evidence of the service of any notice of appeal to be found in the record. In this condition of the record we are without jurisdiction to examine any question in the case. The record should show that an appeal was taken. In the absence of such showing we cannot disturb the judgment.

AFFIRMED.

RILEY V. NORTON.

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|-----|-----|
| 65 | 306 |
| 122 | 26 |
1. **Slander: JUSTIFICATION OF WORDS CHARGING A CRIME: MEASURE OF PROOF: CASES OVERRULED.** In an action of slander for charging plaintiff with the commission of a crime, when the defendant justifies, it is sufficient if he prove by a preponderance of the evidence that plaintiff did commit the crime charged,—following the principle of *Welch v. Jugenheimer*, 56 Iowa 11. The cases of *Bradley v. Kennedy*, 2 G. Greene, 231; *Forshee v. Abrams*, 2 Iowa, 571; *Fountain v. West*, 23 Id., 9; and *Ellis v. Lindley*, 38 Id., 461, holding that the commission of the crime in such cases must be established beyond a reasonable doubt, are overruled.

Appeal from Clayton District Court.

TUESDAY, DECEMBER 9.

Riley v. Norton.

ACTION FOR SLANDER. The crime charged was larceny. The defendant justified. Trial by jury, judgment for plaintiff, and defendant appeals.

James O. Crosby, for appellant.

S. S. Powers, for appellee.

SEEVERS, J.—The court instructed the jury that the defendant must establish beyond a reasonable doubt that the plaintiff did commit the crime of larceny in manner and form as the defendant had pleaded. This instruction is in accord with *Bradley v. Kennedy*, 2 G. Greene, 231; *Forshee v. Abrams*, 2 Iowa, 571; *Fountain v. West*, 23 Id., 9; *Ellis v. Lindley*, 38 Id., 461. Logically, these cases were much shaken by *Welch v. Jugenheimer*, 56 Iowa, 11. It is logically impossible to say that one rule should obtain when an action is brought to recover damages caused by the commission of the crime of arson, and another in an action brought to recover damages for slander charging such crime, when the defendant pleads justification. If an action had been brought to recover the value of the wood alleged to have been stolen in this case, the plaintiff in the action would be entitled to recover if he established, by a preponderance of the evidence, the fact that the wood had been stolen. Logically, the same rule must apply when the same party asserts and relies on the same facts in any other civil action where the right of recovery or defense is asserted.

We deem it unnecessary to enter into an extended discussion of the pending question, simply contenting ourselves with saying that in our opinion the decided weight of the latest authorities is opposed to *Fountain v. West*, and other cases above cited, and that they should be, and are hereby, overruled.

REVERSED.

EGGLESTON V. THE COUNCIL BLUFFS INSURANCE CO.

1. **Insurance: ERROR IN DESCRIBING PROPERTY: LATENT AMBIGUITY: RECOVERY ON POLICY WITHOUT REFORMATION.** The property described in the policy and application in this case was a store building and stock of goods "situated on lots 7 and 8, block 2, in the town of Floris," but the property was actually situated on lots 7 and 8, in block 2, in *Hoisington's addition* to the town of Floris, but there was a block 2, containing lots 7 and 8, in the original town. *Held* that, since the addition was a part of the town, the description in the policy and application might be applied either to the lots in the original town or to those in the addition; that it was not a misdescription, but an ambiguous one, and that the latent ambiguity might be shown by parol in an action by ordinary proceedings, and that it was not necessary to have the error corrected in equity before a recovery could be had on the policy.
2. **Pleading: STRIKING EVIDENCE FROM PETITION: ERROR WITHOUT PREJUDICE.** Letters which were evidence only of ultimate facts pleaded should have been stricken from the petition on defendant's motion, but, it appearing that defendant could not have been prejudiced by the overruling of such motion, a reversal will not be granted on that account.
3. **Insurance: LIMITATION BY POLICY OF SUIT THEREON: WAIVER OF LIMITATION: EVIDENCE.** Where defendant pleaded, in bar of an action upon a policy of fire insurance, that the action was not begun within six months from the date of the loss, as provided in the policy, it was proper to allow plaintiff to introduce letters written by the company to her, which tended to show that she had been induced, by the promises and representations of the company, to delay the institution of the suit.
4. ———: **ACTION ON POLICY: PROOFS OF LOSS AS CONDITION PRECEDENT: WAIVER BY COMPANY.** The provisions of a policy of fire insurance, requiring written proofs of loss, may be waived by the company, and, where such proofs are necessary to be made sixty days before an action can be maintained on the policy, such action may be begun and maintained sixty days after the date of such waiver.
5. ———: ———: **INABILITY TO PROCURE.** Where it is shown that the insured, without any fault or fraud on his part, is unable to procure certain of the proofs of loss required by a policy of insurance, he may recover without a literal compliance with the provisions of the policy in this respect; for the law will not require an impossible thing.
6. ———: **APPLICATION FOR: STATEMENTS BY ASSURED: COMPANY ESTOPPED FROM DENYING: KNOWLEDGE OF AGENT.** Where the

65	308
79	762
65	308
86	148
103	280
65	308
137	406
65	308
142	346

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statements made in an application for insurance were by the contract made a warranty by the assured, but the company, by its agent, who had authority to take the risk, was on the premises when the application was made, and then viewed the property, and himself filled out the application, writing therein statements which he knew were not true, *held* that the agent's knowledge should be imputed to the company, and that it was estopped from claiming that the representations in the application were not true.

7. —: EVIDENCE: LETTER NOT BINDING COMPANY. A letter written to the company by the attorney of the assured, not in response to any communication from the company, but expressing opinions and assuming facts prejudicial to the company, was incompetent as evidence against the company for any purpose.

Appeal from Davis Circuit Court.

TUESDAY, DECEMBER 9.

ACTION on a policy of insurance against loss or damage by fire. Verdict and judgment for plaintiff. Defendant appeals.

Phillips & Day, for appellant.

Payne & Eichelberger, for appellee.

REED, J.—I. The property covered by the policy was a store building and stock of goods. Plaintiff made a written application for the insurance, and a copy of this application was indorsed on the policy when it was issued. In the application, the property to be insured was described as being "situate on and confined to premises now owned and occupied by me in lots 7 and 8, block 2, of Floris, Davis county, Iowa." In the policy, the property insured is described as being "situated on lots 7 and 8, block 2, in Floris, Davis county, Iowa." One defense pleaded by the defendant was that plaintiff had no title to or interest in lots 7 and 8, block 2, in the town of Floris, or in the building situated thereon, and that she had no interest in the property described in the

1. INSUR-
ANCE: error
in describing
property: la-
tent ambigu-
ity: recovery
on policy
without
reformation.

application and policy. It was proved on the trial that plaintiff was a merchant doing business in said town of Floris, and that the building in which she did business was situated on lots 7 and 8, block 2, in Hoisington's addition to said town. It was also proved that the policy was issued by an agent of defendant, who had authority to make the contract, and that before issuing it he visited the premises and made an examination of them, and that he filled out the application, and wrote therein the description of the property, but obtained the information on which he wrote such description from plaintiff, or her son, who was acting for her at the time.

The title deeds, under which plaintiff claimed the property described, conveyed lots 7 and 8, block 2, in Floris, but she and those under whom she claimed had been in actual and uninterrupted possession of the property occupied by her when the risk was taken for more than ten years, under a claim of ownership. It was also shown that there is a block 2 in the original plat of the town, and that there are lots in that block which are numbered 7 and 8. The circuit court, in an instruction to the jury, ruled that plaintiff was entitled to recover, notwithstanding the fact that the property was situated in said addition, if the agent who took the risk knew where it was situated in fact, and intended to insure the building actually occupied by plaintiff, and the goods therein, and was not misled by the description. And, in disposing of a motion by defendant for judgment on the special findings of the jury, that the property owned by the plaintiff was not situated in the original town, but in the addition thereto, the court made substantially the same ruling. This holding is the ground of the first exception argued by counsel for defendant.

The position is, not that the policy is necessarily rendered void by the alleged error in the description of the property, but that, as by its terms it covers property entirely different from that intended by the parties to be included in it, there

can be no recovery upon it at law until, by the judgment of a court of equity, it has been so reformed as to express the real intent and meaning of the parties. The evidence leaves no doubt as to what the real intention of the parties was.

Plaintiff's store-building was situated on the lots in Hoisington's addition, and she desired to obtain insurance upon it, and upon the stock of merchandise which she kept in it. Defendant's agent went to that particular building, and made an examination of the premises with the view of insuring the building and the stock of goods in it; and when he issued the policy he had that property in mind, and supposed he was insuring it; and when plaintiff received the policy she understood that it covered that property. It is now assumed by defendant that the policy covers other and entirely different property, and, if this be true, its position that there can be no recovery in an action at law until there has been a reformation of the contract is also probably correct. Wood, Ins. § 95; *Holmes v. Charlestown Mut. F. Ins. Co.*, 10 Metc., 211; *Ewer v. Washington Ins. Co.*, 16 Pick., 502. But we think defendant is not warranted in this assumption. Whatever of ambiguity or uncertainty there is in the description of the property is created by the words used as descriptive of the lots and block upon which it was situated. In every other respect the description is certain and clear. Considering the description in the application and that in the policy together, and omitting the number of the lots and block, the property described with certainty is the one-story frame store-building in the town of Floris, owned and occupied by plaintiff, and the stock of merchandise kept by her therein. But defendant's position is that the words "lots 7 and 8, in block 2, in the town of Floris," are certainly descriptive of property situate in the original plat of the town. But we think this is not true. The addition is as certainly part of the town as is the land covered by the original plat, and lots 7 and 8, in block 2, in the addition, are in the town, as certainly as the lots of corres-

 Eggleston v. The Council Bluffs Insurance Company.

ponding numbers in the original plat. The description is simply uncertain. It does not with certainty describe property in either the addition or the original plat. There is a block 2 both in the original plat and in the addition, and there are lots numbered 7 and 8 in each of said blocks, and they are each in the town of Floris. The description—"lots 7 and 8, in block 2, in the town of Floris," without more, is therefore uncertain in this, that it does not designate whether the particular lots intended are those in the addition which are so numbered, or those of the corresponding numbers in the original plat; and this uncertainty was made apparent when it was shown that there was an original plat and an addition, and there were lots in each of corresponding numbers. There is a latent ambiguity, then, in the description of the property contained in the policy, and it may be explained by parol in an ordinary action. *Bowman v. Agricultural Ins. Co.*, 59 N. Y., 521; *Wood Ins.*, § 95; 2 Pars. Cont., 558.

II. The policy provides that no suit or action thereon shall be sustained unless commenced within six months after

the occurrence of the loss, and that, if any suit should be commenced thereon after the expiration of six months from the date of the loss, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim. The loss in question occurred on the twenty-first of February, 1883, and the suit was instituted on the third of September of the same year. Plaintiff alleges in her petition that at different times during the first six months after the loss occurred the agents and officers of defendant, in conversation and in letters written to her and to her attorneys, represented and promised that her claim would be paid, and that, believing and relying on these representations, she was induced to forbear the bringing of any suit for the enforcement of her claim until after the expiration of six months from the date of the loss. Attached to the petition as exhibits were a

2. PLEADING:
striking evi-
dence from
petition: er-
ror without
prejudice.

number of letters which, it was claimed, passed between the parties during that period. Defendant moved the court to strike out these exhibits and the allegation making them parts of the petition, on the ground that they were mere matters of evidence, and were not necessary or proper parts of the pleading. This motion was overruled. We think it should have been sustained.

Conceding that it was necessary for plaintiff to allege and prove that she was induced to forbear bringing the suit within the six months by the representations and promises of defendant, she was required to allege in the pleading only the ultimate fact. The letters constituted but a portion of the evidence by which the allegation would be proved, and it was wholly unnecessary to set them out in the pleading; but we cannot say that defendant was in any manner prejudiced by the overruling of the motion to strike them out. We will, therefore, not disturb the judgment on this ground.

III. Defendant set out in its answer the provision of the policy with reference to the time within which suit might be brought thereon, and alleged that plaintiff's right to maintain the action was barred thereby. The parties appear to have tried the case on the theory that, unless plaintiff was induced by some promise or representation of defendant to forbear instituting the suit within six months from the date of the loss, her right of action was barred by this provision. The letters which were attached to the petition were offered in evidence by plaintiff. Defendant objected to them as incompetent and immaterial, but the objection was overruled, and they were read in evidence. We think the ruling was correct. The letters had some tendency to establish plaintiff's claim that she had been induced, by promises and representations of defendant, to delay the institution of the suit.

IV. It is provided in the policy that defendant will pay any loss or damage which may happen to the insured prop-

3. INSUB-
STANCE: limit-
ation by pol-
icy of suit
thereon:
waiver of
limitation:
evidence.

 Eggleston v. The Council Bluffs Insurance Company.

4. INSURANCE: erty during the life of the policy, "sixty days action on policy: proofs of after due notice and proofs of the same shall loss as condition have been made by the assured, and received at precedent: waiver the home office of the company, in accordance by company. with the terms and conditions of the policy." It is provided by another provision that "persons sustaining loss or damage by fire shall forthwith give notice of said loss to the company, and render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portions of all policies thereon; also, the actual cash value of the property, and their interest therein; for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used at the time of the loss; and when and how the fire originated; * * * and shall also produce their books of account and other vouchers, and exhibit the same for examination, and permit copies thereof to be made; and shall also produce certified copies of all bills and invoices, the originals of which have been lost."

Plaintiff alleges that immediately after the fire she gave notice of the loss to defendant, and that a few days thereafter it sent its general agent to examine into the loss and adjust the same, and that said agent made an examination into all the circumstances of the fire, and that she then gave him full information as to the ownership of the property destroyed, and all matters pertaining to the loss, and gave him an invoice of the goods in the building at the time of the fire, and that the agent then and there waived the provision of the policy which requires written proof of the loss to be made, and promised and agreed that, when she procured from the wholesale dealers with whom she dealt invoices and bills of the goods which she had in the building at the time of the fire, and sent the same to defendant, it would pay the loss. She also alleges that afterwards, in the month of May, as a matter of precaution, she made out and

sent to defendant complete and formal proofs of the loss as required by the terms of the policy. Defendant denied these allegations, and alleged that the proofs of the loss required by the policy were not made until the thirteenth of July, and that, as the suit was instituted less than sixty days from that date, no right of action had accrued when it was begun.

There was evidence given on the trial tending to prove the alleged waiver of the provision requiring written proofs of the loss, and it was proved that, on the twenty-third of May, plaintiff prepared and sent to defendant her affidavit, in which some of the matters were shown which, by the provision of the policy, were required to be shown by the proofs of loss, and that defendant's adjusting agent, on the ninth of July, wrote to plaintiff's attorneys, and pointed out several particulars wherein he claimed said affidavit was insufficient as a proof of loss. And on the thirteenth of July plaintiff's attorneys prepared and sent to defendant additional proofs, to which it does not appear that any exception was taken. Defendant contends that "due notice and proof" of the loss were not made until the last proofs were received by it, and that, as the suit was instituted less than sixty days from that date, it was prematurely brought. But the jury found specially that the provision was waived by the adjusting agent who made the examination soon after the occurrence of the fire, and this was on the sixth of March, so that, if a right of action has accrued at all in plaintiff's favor, it accrued not later than sixty days from that date. That the provision of the policy requiring written proofs of the loss to be made may be waived, is well settled by the authorities. See Wood, Ins., § § 414, 496; *Lycoming Fire Ins. Co. v. Dunmore*, 75 Ill., 14; *Patterson v. Triumph Ins. Co.*, 64 Me., 500.

V. Plaintiff does not claim that the provision of the policy under which she may be required to furnish certified

5. — : — :
— : inability
to procure.

copies of all bills and invoices, the originals of which were lost, was waived, but, on the contrary,

alleges that she agreed to procure such copies from the wholesale merchants from whom she had purchased the goods, and forward the same to defendant. The evidence shows that she made efforts to procure these bills, but was able to procure but a portion of them, and the jury found specially that she furnished them so far as it was in her power so to do. Defendant contends that plaintiff's right to recover at all is dependent on a literal compliance by her with this provision of the policy. But we think she is not required by the provision to perform an impossible thing, and if it can be shown that, without any fault or fraud on her part, compliance is rendered impossible, she may recover without performing the condition. *Wood, Ins.*, § 423; *Bumstead v. Dividend Mut. Ins. Co.*, 12 N. Y., 81; *O'Brien v. Commercial Fire Ins. Co.*, 63 N. Y., 108. The jury found specially that plaintiff had furnished copies of the bills and invoices so far as it was possible for her to do so, and this finding is conclusive of the question.

VI. The application contained statements with reference to the size of the building insured, the manner of its construction, the material of which it was constructed, and the time when it was built; and it is provided in the policy that the application shall be considered as a warranty by the assured. It was shown upon the trial that these statements, in some respects, were not true. The circuit court instructed the jury that the application was to be regarded as part of the contract, and that the statements therein were warranties, and, if any of said statements were not true when made, this would defeat a recovery by plaintiff on the policy, unless defendant had knowledge when it issued the policy that the statements were not true. But if defendant's agent, who solicited the insurance, had authority to take the risks, and he filled out the application, and was present on the ground, and viewed the premises, and had an opportunity to examine them, and then knew the location of the building, and its size, and the material of which it was constructed, and the

6. ——— :
application
for: state-
ments by as-
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pany estop-
ped from de-
nying: knowl-
edge of agent.

manner of its construction, his knowledge in this respect would be imputed to the company, and it would now be estopped from claiming that said representations were not true. Exception is taken by defendant to the last proposition contained in the instruction; but it is in accord with the rule on the subject as laid down by this court in *Jordan v. State Ins. Co.*, 64 Iowa, 216; *Williams v. Niagara Fire Ins. Co.*, 50 Iowa, 568; and *Miller v. Mutual Benefit L. Ins. Co.*, 31 Iowa, 223.

VII. Plaintiff was permitted, against defendant's objection, to introduce in evidence a letter to defendant, written by her attorneys, and which accompanied the proofs of loss which were sent July 13. This letter was in no sense an answer to any communication from defendant. In it the writer expresses the opinion that plaintiffs' claim is a just one, and that her loss was an honest loss. It is also stated in the letter that plaintiff had learned with satisfaction that defendant had paid a portion of the amount of the loss to one of her creditors, to whom she had directed it to be paid. We think it very clear that this letter should have been excluded. It was incompetent for any purpose, and its admission could hardly have been otherwise than prejudicial to defendant. If defendant had in fact paid a portion of the loss to plaintiff's creditors on her order, this would have been an admission by it of the validity of the claim. And the statement in the letter was well calculated to create the impression in the minds of the jurors that this had been done. The expressions of opinion by the writer of the letter were equally objectionable. For the error in admitting this letter in evidence, the judgment of the circuit court must be

7. ——— :
evidence:
letter not
binding com-
pany.

REVERSED.

STIBBS V. AGNER & CO.

1. **Landlord and Tenant: INJUNCTION IN AID OF LANDLORD'S LIEN:**
FACTS NOT WARRANTING: DISCRETION OF TRIAL COURT: While the granting as well as the dissolving of an injunction rests much in the discretion of the court, and while such discretion will not be interfered with by the appellate court, except where there is a manifest abuse of discretion or a mistake of law, yet, in this case, where the injunction was granted to restrain the removal of goods from a store-room, for the purpose of preserving plaintiff's alleged lien for rent, but it appears that between plaintiff and defendants the relation of landlord and tenant never existed, (for the facts see opinion,) and that defendants held the store room only under an assignment of the lease from plaintiff, which assignment the landlord refused to recognize, and that defendants had more than paid plaintiff for the time they had occupied under the assignment, *held* that the injunction should have been dissolved upon interlocutory motion, and that it was reversible error to overrule the motion and to continue the injunction to the hearing.

Appeal from Linn Circuit Court.

TUESDAY, DECEMBER 9.

ACTION for an injunction to prevent the removal of a stock of goods from a certain store occupied by the defendants in the city of Cedar Rapids. The action is brought upon the theory that the plaintiff has a landlord's lien upon the stock, and that the defendants threaten to remove the stock and deprive him of his lien, which he needs for security for the payment of rent. A writ of injunction having been issued and served, the defendants filed an answer, denying that plaintiff has a landlord's lien. They also filed a motion to dissolve the injunction. The court overruled the motion and continued the injunction to the hearing. The defendants appealed.

Stoneman, Rickel & Eastman, for appellants.

Mills & Keeler, for appellee.

ADAMS, J.—It was said in *Fuson v. Conn. Gen. Life Ins.*

Co., 53 Iowa, 611, that "the granting as well as the dissolving of an injunction rests much in the discretion of the court, and such discretion will not be controlled by the appellate court, except where there is a manifest abuse of discretion or mistake of law." In support of this rule were cited *Hil. Inj.*, 107; *Johnson v. Allen*, 35 Ga., 252; *Howell v. Lee*, 36 Id., 76; *De Godey v. Godey*, 39 Cal., 157. The plaintiff relies upon this rule as being sufficient to sustain the ruling of the court. But upon no theory of the plaintiff's case, taking the averments of his petition as a whole, and the evidence adduced in their support, can we see how the ruling can be sustained. The difficulty with which the plaintiff has to contend is fundamental. He not only, as it appears to us, had nothing which he could lease, but he never made even a pretended lease or sub-lease. The owner of the building is one Calder. When the defendants put their stock of goods into it, they did so under the supposition that they had become, or were to become, the assignees of a lease theretofore made to other parties by Calder. Discovering, as they thought they did, and as is now conceded, that they had not become the assignees of the lease, and could not acquire it, they hired another store, and were about to move into it. It is not material for the defendants to show that they did not become assignees of the lease. If they had done so, and had taken possession under it, such fact would not aid the plaintiff. The defendants in such case would have been tenants of Calder, and, if any one would have had a landlord's lien upon the goods for rent, it would have been the landlord, Calder. The plaintiff's counsel, at the present stage of the case, appreciate this fact, and in argument expressly deny that the defendants became assignees of the lease. Their theory now is that the plaintiff is a tenant of Calder, and has sublet the premises to the defendants.

It is not to be denied that there were certain negotiations concerning the premises between the plaintiff and defendants, and a supposed transaction sufficient to give the defendants a

right to occupy the premises; but the business, so far as the plaintiff is concerned, seems to have been conducted with the crudest conception of its legal character, and with unaccountable looseness. The lease from Calder was made to the firm of Stibbs & Martell, composed, as we infer, of the plaintiff, H. B. Stibbs, and one P. Martell. They occupied under the lease, as it appears, about one year. Stibbs then assigned his interest to Martell, and, as we infer, withdrew from the firm, leaving Martell in the business. Martell executed chattel mortgages upon the stock to different creditors, and to the plaintiff, among others. The mortgagees after a while took possession of the stock and store, and sold the goods. To induce Calder not to interfere by the assertion of his lien for rent, they gave him an obligation whereby they became personally liable to him for the payment of the rent. The plaintiff then formed the plan of finding some one who would take an assignment of the lease, and enable the mortgagees to become discharged from further liability on their obligation. He had come into possession of the lease in some way, whether rightfully or not it does not very clearly appear; but it is shown that Martell never made any assignment of it, and, so far as we can discover, he is still the owner of it.

The plaintiff, as one of the mortgagees, and with, perhaps, some authority from the other mortgagees, seems to have become the active man in closing out the stock under the mortgages. What his precise powers and duties were we cannot ascertain. The evidence upon the point is exceedingly meager. He describes himself in his petition as "custodian;" but, as that word has no special legal import, we cannot take judicial notice of the powers, if any, conferred by his appointment as custodian. It is certain, however, that he claimed the right to make an assignment of the lease, and he made an indorsement thereon in these words: "For value received, I hereby transfer and assign all of Stibbs & Martell's interest in and to the within lease to Wm. Agner & Co.," and signed the same "H. B. STIBBS, custodian

for P. Martell, mortgagees." What he meant by the description of himself appended to his name, we are not entirely certain, but it seems probable that he intended to describe himself as custodian of the lease for P. Martell and his mortgagees. This view, we think, would be as favorable as any for the plaintiff, and we will assume that it is correct. But the assignment, so far as the body of it is concerned, purported to carry only the interest of the firm of Stibbs & Martell, and the evidence shows, as we have stated, that Stibbs assigned his interest to Martell, and, this being so, there was no interest left in the firm to be assigned.

Whether the assignment purported to convey Martell's interest it is not important to determine. There is no pretense that Stibbs had authority to act for Martell. It is, to be sure, claimed in argument that Stibbs had authority to act for Martell's mortgagees. But it is not shown that he had, neither is it shown that the mortgagees were the owners of the lease, nor does the assignment, so far as the body of it is concerned, purport to convey any interest held by them. What is more, if we should put any construction upon the assignment which the plaintiff might ask, we are unable to see how it would aid him to maintain this action. An assignment, whether made by the firm of Stibbs & Martell, or by Martell as an individual, or by Martell's mortgagees, would not create an interest in the plaintiff so as to give him a right to a lien. This difficulty the plaintiff has come to appreciate, and he is contending now that he sublet to the defendants. His theory is, as we understand, that, having attempted to make an assignment of the lease, and such assignment having no validity, the defendants became subtenants under him, and that, too, for the remainder of the term. But this position cannot be sustained. The understanding of the defendants was that they were to become assignees of the lease, and not sublessees. The plaintiff declares in his petition that he "assigned to them all the right, title and interest of Stibbs & Martell in and to the said lease, as shown by

the assignment in writing on the back of said lease;" and that "the defendants accepted the building under the terms of the original lease, and the lease itself." In his testimony he said: "I never made any written lease with the defendants, Agner & Co. *My contract was the assignment referred to in the papers.*" In an affidavit he said that his proposition to the defendants was to "assume the lease for the unexpired term," and, "that on April 24, 1884, the defendants wrote to this plaintiff a letter, whereby they recite the terms of said written lease between the landlord and mortgagor, P. Martell, and agreeing to take the same, being the same lease attached to the plaintiff's petition." Two days later the plaintiff answered the letter in these words: "GENTS: Your favor of the twenty-fourth inst. received, accepting proposition to transfer lease of store-room. As an earnest of good faith on your part, please send us \$100, to apply as one month's rent, and we will *agree to transfer lease.*" The defendants, in sending money to pay rent, demanded that plaintiff should procure a receipt from the lessor, Calder. One William Green, in an affidavit, shows that he was present when the plaintiff's proposition was made to the defendants, and he says that the proposition was "that plaintiff would transfer the lease to them, and give them possession June 1, 1884, for the remaining term of said lease, and on no other terms whatever." We find no evidence to the contrary.

We regard it, then, as proven beyond dispute, that what the defendants contracted for was an assignment of the lease. It was their right to have that or nothing. Under an assignment, they would become tenants of Calder, and could pay, as their safety required, directly to him. But a trouble arose. The lease was not assignable without Calder's consent. The defendants, as we infer, were strangers in Cedar Rapids. At all events, Calder's consent could not be obtained. The plaintiff, in his testimony, says: "Mr. Calder was never asked to recognize anybody else as his tenants until after the lease had been transferred to Wm. Agner & Co.; he then

Jaffray & Co. v. Thompson.

declined to accept them as his tenants and relieve me or the mortgagees." The relation of a subtenancy was precisely what both plaintiff and defendant were trying to provide against. When the defendants found that they had acquired no valid assignment of the lease, and could obtain none, it was unquestionably their right to vacate the premises and take their goods with them. They had paid for all the time they had occupied, and more too.

The injunction, we think, should have been dissolved.

REVERSED.

JAFFRAY & Co. v. THOMPSON.

1. **Appeal to Supreme Court: FROM ORDER OF CONTINUANCE.** An appeal does not lie from an order of continuance, it not being a final order.
2. **Evidence: RECORD OF MORTGAGE.** The record of a mortgage is but secondary evidence of its contents, and is not admissible, unless a sufficient reason is given for the non-production of the original writing.
3. ———: **IMPROPERLY ADMITTED ON TRIAL OF LAW CASE TO COURT: REVERSIBLE ERROR ON APPEAL.** Where improper evidence is admitted in the trial of an action at law, though the trial be to the court, it must on appeal be deemed to be error, unless the record shows affirmatively that it was afterwards discarded.
4. ———: **ERROR IN ADMITTING: NO PREJUDICE—NO REVERSAL.** The admission of improper testimony on a point sufficiently established by other proper testimony can work no prejudice, and is no ground for reversal.
5. ———: **SECONDARY: ADMISSION OF WITHOUT OBJECTION: EFFECT OF.** Secondary evidence admitted without objection becomes, in effect, primary evidence.
6. **Chattel Mortgage: POSSESSION UNDER: NOTICE TO ATTACHING CREDITORS: EVIDENCE.** Possession of property under an unrecorded chattel mortgage is notice to subsequent attaching creditors of the mortgagee's interest; and the evidence of such possession in this case (see opinion) was sufficient to sustain the finding of the court.

Appeal from O'Brien Circuit Court.

TUESDAY, DECEMBER 9.

65	323
82	544
65	323
115	226
65	323
126	312
65	323
144	311

Jaffray & Co. v. Thompson.

ACTION IN REPLEVIN. The property in question consisted of a stock of agricultural implements kept for trade by the firm of Teabont & Vallean, who were doing business as merchants in the town of Sanborn, O'Brien county. On the twenty-ninth day of April, 1881, the defendant, Thompson, as a creditor of Teabont & Vallean, caused a writ of attachment to be levied upon the stock. The plaintiffs aver that, at the time of such levy, they were creditors of Teabont & Vallean, and held a mortgage upon the stock. There was a trial without a jury, and judgment was rendered for the plaintiffs. The defendant appeals.

H. C. Hemenway, for appellant.

Barrett & Bullis and *J. H. Swan*, for appellees.

ADAMS, J.—The defendant's position is that there is no proper evidence that the plaintiffs had any mortgage upon the stock at the time of the levy, and, even if they had, that evidence shows that the levy was made without notice to defendant of the mortgage. It is certain that the plaintiffs had no mortgage of record at the time of levy, but they claim that the evidence shows that they had a mortgage, and were in possession under it, and, what is more, that the officer who made the levy was expressly notified that they had such mortgage before he made the levy.

I. The first error assigned pertains to a ruling of the court upon a motion for a continuance. The motion was based upon the absence of an alleged material witness, Mr. C. Wellington, who, it was alleged, took the mortgage as attorney of the plaintiffs. The motion was accompanied by an affidavit of Mr. Wellington himself. The court ruled that under the showing the plaintiffs were entitled to a continuance. Thereupon, to avoid a continuance, the defendant admitted that Mr. Wellington, if present, would testify as stated in his affidavit. Under such admission the parties went to trial. The defend-

1. APPEAL TO
supreme
court from
order of con-
tinuance.

ant now insists that the showing made for a continuance was insufficient, and that the court erred in putting him to his election to suffer a continuance or make the admission above set out. But, in our opinion, we could not reverse, if we should be satisfied that the showing for a continuance was insufficient. An appeal does not, we think, lie from an order of continuance. It is a mere intermediate order, not materially affecting the final decision. Besides, there was no continuance. The defendant elected not to suffer a continuance. In no view do we think that he has now a ground of appeal.

II. The mortgage was not introduced in evidence. The plaintiff relied upon secondary evidence, consisting of the 2. EVIDENCE: testimony of witnesses. We think that they also record of mortgage. relied upon the record of the mortgage. The defendant objected to the introduction of the record on the ground that it was secondary evidence, and that the proper foundation had not been laid for it by showing a sufficient reason for the non-production of the mortgage itself. The court, however, admitted the record, and the defendant assigns the admission as error. If it had been important to show that the mortgage had been recorded, the record would, of course, have been the proper evidence of such fact. But the record was made after the levy, and the only object in introducing the record must have been to prove the contents of the mortgage. For such purpose it was clearly inadmissible, unless a sufficient reason had been given for the non-production of the mortgage itself; and we have to say that we do not think that such reason had been given.

In passing it may not be improper that we should advert to certain language of the court set out in the abstract, and said to have been used by it as expressive of its view upon the question of the admission of this record. It is shown that the court admitted it because the case was being tried without a jury, and the court was fully at liberty to disregard it, if in the further consideration of the case it should appear

3. —: Improperly admitted on trial of law case to court: reversible error on appeal.

that the evidence was not proper. But it is manifest that where, in an action of law, improper evidence is admitted, the error cannot be deemed to have been eliminated unless the record shows that the evidence was afterward discarded. In an action at law the finding of the court upon a question of fact has the force of a verdict of a jury. The rule is that, however much inclined the appellate court might be to think that the finding should have been otherwise, it is not justified in disturbing the finding, unless it is so wanting in support as to evince passion or prejudice, and preclude the idea that it was the court's actual judgment. But clearly it would be improper to give such force to the finding in a case where it is seen that it may have been based upon improper evidence. Where, then, improper evidence is admitted in the trial of an action at law, though the trial be to the court, it must be deemed to be an error, unless the record shows affirmatively that it was afterwards discarded. *Johnson v. Harder*, 45 Iowa, 680. In the case at bar it is not claimed that the record so shows.

But, notwithstanding the error, we cannot reverse, if it appears affirmatively that the defendant could not have been prejudiced; as, for instance, if all that the record of the mortgage purported to show was shown by other undisputed evidence. The plaintiffs, in their petition, declared upon a mortgage as executed upon the property in question by Teabout & Valleau, on the fifth day of April, 1881. The record purported to show a mortgage identical with that declared on. But other undisputed evidence, it appears to us, showed substantially the same thing. Mr. Wellington stated in his affidavit, admitted in evidence, that, as attorney for the plaintiffs, he, on the fifth day of April, 1881, took a mortgage executed to the plaintiffs by Teabout & Valleau, upon "all the personal property named in the petition." One of the firm of Teabout & Valleau testified, in substance, that about that time the firm executed a chattel mortgage to the plaintiffs, which mortgage was

4. ———: error
in admitting:
no prejudice
—no reversal.

drawn by Wellington, and that afterwards one Adams came, as agent of the plaintiffs, and took possession of the stock in question for them under the mortgage. This evidence the defendant did not attempt to rebut, and, if competent, we think it showed, beyond controversy, the execution of the mortgage, and what property it covered. It is insisted, how-

ever, that the evidence was not competent, because secondary, and that the proper foundation had not been laid for it. But it does not appear to have been objected to upon that ground, and in the absence of such objection, secondary evidence becomes in effect primary evidence. *Moore v. McKinley*, 60 Iowa, 374.

III. It is said, however, that there is no sufficient evidence that the defendant had notice of the mortgage. But

5. ———: secondary: admission of without objection: effect of.
6. CHATTEL mortgage: possession under: notice to attaching creditors: evidence.

we think that there was evidence tending to show that the plaintiffs at the time of the levy had possession. One Adams came from Decorah, ostensibly for the plaintiff, and took possession, and placed one White in charge. As to the authority of Adams, the witness, Teabout, testified as follows: "*Question.* After the making of this mortgage, what did you do in relation to turning the property over to E. S. Jaffray & Co.? *Answer.* He (evidently meaning E. S. Jaffray & Co.) sent an agent here. We turned over the wigwam (the building containing the property) to him. *Q.* Who was the agent? *A.* I think it was Mr. Adams." The defendant insists that it does not appear that Teabout knew that the plaintiffs sent Adams. But he assumed in his testimony that he knew it, and it is not for us to say that he did not.

It is understood that Adams, after having taken possession, put White in charge, and we think that the evidence shows that White remained in charge until the levy. It is true, the evidence shows that White had been formerly in Teabout & Valleau's employ, and it is insisted that there was no apparent change of possession. But we think that there was evidence upon which the court below might have found that

Corning v. Grohe.

there was. There was certainly a transfer of possession to Adams, and there was evidence tending to show that before White was placed in charge he had ceased to be employed by Teabout & Vallean.

We think that the judgment must be

AFFIRMED.

CORNING V. GROHE.

1. Contract: FOR DISSOLUTION OF PARTNERSHIP: CONSTRUCTION OF.

The parties hereto, having been partners in the practice of the law, upon dissolution, entered into a written stipulation, of which the following was a part: "It is further agreed by said parties that if said sum of \$1,182 can be made and collected from said accounts and notes by reasonable diligence, same is to be applied in payment of said sum, and the balance of said accounts and notes to remain the property of Corning and Grohe; the said Grohe to be liable for any balance of said sum remaining unpaid; the said sum being due said Corning upon settlement this day made." The notes and accounts referred to belonged to the firm at the time of dissolution. *Held* that, in view of all the facts and circumstances, the plain language of the contract should be followed, to the effect that the *whole* of the proceeds of the notes and accounts was to be applied to the payment of the \$1,182, until the same should be paid, and not only such part thereof as corresponded to defendant's interest in them before the contract was made.

- 2. —: MISTAKE: REFORMATION.** It is only a mistake of *fact* that entitles a party to the reformation of a contract in equity. A mistake of law does not.

Appeal from Clinton Circuit Court.

TUESDAY, DECEMBER 9.

THIS is an action in equity to reform a contract of settlement of the affairs of partnership, and to recover an amount of money which plaintiff alleges is due him under said contract. The circuit court refused to reform the contract, but

rendered judgment for plaintiff for a portion of the amount claimed. Both parties appeal.

A. R. Cotton, A. F. Wheeler and N. Corning, for plaintiff.

Ellis & McCoy and W. C. Grohe, for defendant.

REED, J.—It is shown by the pleadings and evidence in the case that the parties entered into partnership in the practice of law in 1872, and that this partnership was continued until February 1, 1878, when it was dissolved by the mutual consent of the partners. At the time of dissolution a notice was prepared for publication, which recited the fact of the dissolution; also that the notes and accounts belonging to the firm remained in plaintiff's hands for settlement and collection. This notice was signed by each of the parties, and they at the same time signed the following stipulation, which was written on a paper containing a copy of said notice, and immediately below said copy: "It is further agreed by said parties that, if said sum of \$1,182 can be made and collected from said accounts and notes by reasonable diligence, same is to be so applied in payment of the said sum, and the balance of said accounts and notes to remain the property of Corning and Grohe; the said Grohe to be liable for any balance of said sum remaining unpaid; the said sum being due said N. Corning upon settlement this day made." The original of this stipulation was retained by defendant, and plaintiff retained a paper marked "copy," which contains a copy of the notice of dissolution, also of the stipulation; but at the time it was introduced in evidence it contained a provision, which was interlined, that the amount which was due plaintiff should bear ten per cent interest.

Plaintiff's claim is that defendant's interest in the notes and accounts of the firm was one-third thereof, and that the real agreement between the parties was that this proportion of the amount which should be collected on said notes and accounts

Corning v. Grohe.

should be applied in satisfaction of said indebtedness, and that, if the contract provides for the application of a greater proportion of such collections than that to the satisfaction of said debt, it was so written by mistake; and he alleges that he has collected all of said notes and accounts which are collectible, and that, after applying one-third of the amount so collected on the indebtedness and interest thereon, there remains due him the sum of \$1,377.52; and he prays that the writing may be so reformed as to express the real contract between the parties, and that he have judgment for the amount of said balance. Defendant denied that there was any mistake in the writing, or that it fails to express the contract of the parties. He also denies that the provision for interest, which is interlined in the copy of the contract held by plaintiff, is any part of the agreement. The circuit court ruled that a reformation of the writing was unnecessary, and that, upon the agreement as written, but one-third of the amount collected on the notes and accounts could be applied in satisfaction of said amount. It also found that the provision for interest in the copy was not a part of the contract; and it gave judgment for plaintiff for the amount of the difference between \$1,182 and one-third of the amount collected on the accounts and notes.

I. The first question presented by the record relates to the proper construction of the written stipulation. The controversy between the parties is as to whether the writing provides for the application of the whole amount which should be collected on the notes and accounts of the firm in satisfaction of the indebtedness, or whether the provision is for the application only of such proportion of the amount so collected as should equal defendant's proportionate interest in the notes and accounts. The holding of the circuit court was that the writing provided for the application of the latter amount. It will be observed that the indebtedness, to the satisfaction of which the amount collected is to be applied, is a debt from defendant to plaintiff.

1. CONTRACT:
for dissolution
of partnership: con-
struction of.

iff, and not from him to the firm. Also that plaintiff, as well as defendant, had an interest in the notes and accounts from which the money to be applied was to be derived, and, if it could be presumed that these were the only facts taken into consideration by the parties when they made the writing, it would be most unreasonable to suppose that they ever intended to make the agreement which defendant contends is expressed by it. But it is apparent from the writing that other matters must have entered into the consideration of whatever agreement was made. The transaction was a settlement of complicated accounts between the parties, growing out of an extensive business, and covering a long period of time. By the contract plaintiff obtained exclusive control of the settlement and collection of all debts due or owing the firm. It was, in effect, an assignment by defendant to plaintiff of all his interest in the notes and accounts of the firm, or, at least, in such portion of them as should be necessary for the satisfaction of said indebtedness.

It must be presumed that the advantage of having the exclusive control of these notes and accounts, and of their settlement and collection, was a matter of importance to plaintiff, and that it operated as an inducement to him to enter into the contract, and for that reason it could not be said that his agreement to apply the whole amount of the collections upon the debt until it should be satisfied, (if that is the stipulation,) was not supported by a consideration. The agreement, then, which defendant contends is expressed by the writing, would be a valid and enforceable contract; and, considering the language of the contract and all of its provisions, as well as the object which the parties had in view when they made it, it seems to us that it is not fairly capable of the construction placed upon it by the circuit court. The language of the provision in question is as follows: "It is agreed * * * that if said sum of \$1,182 can be made and collected from said accounts and notes, * * * same is to be applied in payment of said sum."

This language is not ambiguous or uncertain, and the meaning clearly expressed by the words is that the whole amount which shall be collected on said notes and accounts shall be applied on said sum until it is satisfied, and there is nothing in the other provisions which requires us to give to the words any other than their ordinary sense.

II. The next question is whether plaintiff is entitled to have the writing reformed. We are clear that he is not.

2. ____: The stipulation was not made under any mistake
mistake: re- of fact. All that can be claimed is that plaintiff
formation. did not understand the legal effect of the instrument. But this was a mistake of law, and it affords no ground for the reformation of the writing. *Gerald v. Elley*, 45 Iowa, 322.

III. The finding of the circuit court that the provision for interest was not part of the contract is sustained by the evidence. The amount collected by the plaintiff on the notes and accounts, as shown by the evidence, is less than the amount of the indebtedness. Plaintiff is entitled to judgment for the difference, which we find to be \$154.56. At his election, this judgment will be entered here, or the cause will be remanded, with directions to enter it in the circuit court.

REVERSED.

CHISHOLM BROS. v. FORNY ET AL.

CANTERBURY & Co. v. SAME.

MORSE & Co. v. SAME.

1. **Corporations: LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS: PURCHASE OF STOCK WITH WORTHLESS PATENT.** Where a corporation was organized for the manufacture of a patented article, and the amount of capital stock was \$10,000, all of which was taken by defendants in exchange for their interest in the patent, which proved to be worthless, *held* that defendants were personally liable to the creditors of the corporation to the extent of the stock so taken by them severally, under sections 1082 and 1084 of the Code.

Appeal from Des Moines Circuit Court.

TUESDAY, DECEMBER 9.

THESE causes were submitted on a single abstract. The petitions stated that the several plaintiffs recovered judgment against the Burlington Manufacturing Company, and that executions were issued, and a demand made on the last acting president of the corporation to point out corporation property upon which the same could be levied, and that he failed to do so; that the defendants are owners of certain shares of the capital stock of the corporation, for which they had paid nothing, and a judgment was asked against the defendants for the amount of the capital stock owned by each of them. The defendants answered the petition, and, in substance, pleaded that they and others were the owners of a valuable patent, for certain specified territory, for a new and improved churn, and were about to manufacture and vend said machine jointly, in a manner to be agreed upon; that afterwards a joint-stock corporation was organized, known as the Burlington Manufacturing Company, for the purpose of selling territory and manufacturing churns; that it was agreed by and between said corporation, the defendants, and other owners

65	333
104	508
65	333
111	670

of the patent, that they would sell it to the corporation for the sum of \$10,000, payable in stock of the corporation. In accordance with this agreement the corporation was formed, the patent transferred to it for the price named, and stock issued to the defendants therefor; that said transaction was entered into in good faith, and that the patent was reasonably worth the sum above stated; that said corporation has disposed of the patent, and said contract cannot be rescinded and the parties placed in the same position they were in before it was entered into. The defendants also pleaded the statute of limitations. The plaintiff, in reply, stated that the patent was worthless, and its purchase, and the attempted release of defendants from their obligations to pay for the stock, was a device to defeat the rights of plaintiff, and a fraud upon it and other creditors of the corporation. Trial to the court, and judgment was rendered against the defendants, Forny and McIntire, and they appeal.

Hall & Huston, for appellants.

P. Henry Smythe & Son, for appellee.

SEEVERS, J.—No finding of facts was made by the court, and there is but little conflict in the evidence. Sprague was the owner of a patent, and he sold an interest therein to the defendants and others. Such interest was transferred to said parties. Appellants paid no "money or property" for the interest assigned to them, the consideration being their knowledge, experience, and supposed influence. At least, the court was warranted in so finding. It will be assumed that the appellants, at the time the patent was assigned to them, believed it was valuable. But the court, under the evidence, was warranted in finding that it was worthless. Afterwards the patent was transferred to the corporation, in consideration of \$10,000 of its capital stock, which was issued to the appellants and others for the interest therein, which had been previously transferred to each of them by Sprague.

The capital stock of the corporation was fixed at \$10,000; the only property owned by it was the patent. The corporation became indebted to the plaintiffs, who recovered judgment against it, and, there being no corporate property to satisfy the same, the question to be determined is whether the appellants are individually liable.

I. Persons dealing with the corporation had the right to assume that it owned available assets to the amount of the capital stock; that is to say, that, in consideration for the stock issued, the corporation had received money or property which would be available to pay any indebtedness incurred in its business. A patent is, as has been said, "a property in notion, and has no corporal, tangible substance," and cannot be levied on and sold under execution issuing from the state courts; and whether it can be sold on executions issuing from the federal courts is regarded as doubtful. *Stephens v. Cady*, 14 How., 528; *Stevens v. Gladding*, 17 How., 447. Until its usefulness has been established, the value of a patent right is purely speculative.

In the present case, the appellants believed the patent to be valuable, but it in fact was worthless. It was not and could not be made available for the purpose of paying the indebtedness of the corporation. In payment for the stock issued to them by the corporation, the defendants transferred to it their interest in this worthless patent. It seems to us, as was said in *Osgood v. King*, 42 Iowa, 478, that it would "be a reproach to the law," if, under these circumstances, the appellants are not individually liable to the creditors of the corporation to the extent of their subscription to the capital stock. As the appellants did not pay any value for their stock, they are liable in this action, under sections 1082 and 1084 of the Code. The former is as follows: "Neither anything in this chapter contained, nor any provisions in the articles of incorporation, shall exempt the stockholders from individual liability to the amount of the unpaid installments on the stock owned by them, or transferred by them

for the purpose of defrauding creditors; and execution against the company may, to that extent, be levied on the private property of any such individual," as provided in section 1084. Under the statute, the stockholder's liability is fixed by a simple failure to pay for the stock issued to him, and the right of the creditor is in no respect impaired for the reason that his interest in the patent cannot be returned. The creditor's right is independent of that of the corporation, and he is not required to proceed in equity and have the contract between the stockholders and the corporation rescinded. When the defendants received the stock, there was implied by law an obligation, as between them and the creditors of the corporation, that they would pay for it.

II. As there was no written obligation executed by the defendants, it is said that the cause of action was barred in five years after it occurred. This action was commenced on the fifth day of September, 1882. We, however, are unable to determine from the abstract when the plaintiff's cause of action against the corporation accrued; and, conceding that the statute began to run at that time, we are unable to say that this action was barred when it was commenced.

AFFIRMED.

THE STATE V. CLARK.

1. **Criminal Law:** **RELEASING DISTRAINED SWINE.** The word "stock," as used in section 2, chapter 188, Acts of the Eighteenth General Assembly, making it a misdemeanor to release distrained stock, has its ordinary meaning as used in agriculture, and includes swine.

Appeal from Black Hawk District Court.

TUESDAY, DECEMBER 9.

THE defendant, upon an information filed before a justice of the peace, was convicted of unlawfully releasing distrained

stock. He was again convicted upon an appeal to the district court, and now appeals to this court.

E. M. Sharon, for appellant.

Smith McPherson, Attorney-general, for the State.

BECK, J.—I. The facts of the case, as agreed upon, are these: The defendant forcibly and unlawfully released certain swine owned by him, which had been legally distrained. The cause of the distraint, as we understand it, was that the animals were unlawfully running upon the land of the distrainer. The prosecution is based upon section 2, chapter 188, Acts of the Eighteenth General Assembly, which is in these words: "That if any person, by force or otherwise, without leave of the person having stock under distraint, relieve the stock from distraint, he shall be guilty of a misdemeanor, and shall pay a fine of not less than ten dollars nor more than one hundred dollars, or by imprisonment in the county jail not less than ten days nor more than thirty days."

II. Defendant insists that the act of which he is charged is not an offense under the section, for the reason that under our statutes the word "stock," as used in the provision just quoted, does not include swine. The position is based upon the ground that Code, § 1450, as amended by chapter 70, Acts of the Fifteenth General Assembly, declares that the word "stock," as used in that section and the amendatory acts, means cattle, horses, mules and asses.

III. Before the act of the Fifteenth General Assembly, it was lawful for all stock to run at large, unless restrained upon a vote of the electors of the county at an election when the question was submitted by order of the supervisors. Code, § 309. That general assembly, in the act referred to, prohibited swine, sheep and goats from running at large. As the law stood after this enactment, the voters of the counties could determine only whether cattle, horses, mules and asses should run at large. Hence the word "stock," as used in

The State v. Clark.

the act, and in Code, § 309, was restricted so as to apply only to the stock just enumerated. Under Code, § 1452, a person upon whose land any stock or domestic animals were found running at large contrary to law could distrain them. These statutes, therefore, provided for distraint of swine and other stock, when found trespassing upon the lands of the distrainor. The act of the Eighteenth General Assembly, above quoted, provides punishment for the act of unlawfully releasing "*stock*" from restraint. The word "*stock*," in agriculture, means domestic animals collected, raised or used on a farm. Webst. Dict. Its restricted meaning, as prescribed by the fourth section of chapter 70, Acts of the Fifteenth General Assembly, is expressly made applicable to that chapter, and to Code, § 309, and to no other statutes. The restricted meaning, therefore, fixed by the statute, is not to be applied to the word when it is found in other statutes. The word, when used in the second section of the Acts of the Eighteenth General Assembly, is not restricted in meaning by the older statute, but bears its common signification.

IV. It is obvious that the general assembly did not intend to make it punishable to release unlawfully from distraint cattle, horses, etc., yet prescribe no penalty for unlawfully releasing swine. The law authorizes the distraint of these several kinds of animals. It is not reasonable that the statute should punish the unlawful release of cattle, horses, mules and asses from distraint, and provide no penalty for a like unlawful act in releasing swine. Without a penalty punishing the unlawful release of swine distrained, the law cannot be well enforced. It is not reasonable to suppose that the legislature intended that the statute authorizing distraint of cattle, horses, mules and asses should be enforced by penalty, and that the same statute relating to swine should be disobeyed with impunity. In our opinion the judgment of the district court ought to be

AFFIRMED.

Hildreth v. Crawford et al., Commissioners of Pharmacy.

HILDRETH V. CRAWFORD ET AL., COMMISSIONERS OF PHARMACY, ETC.

1. **Pharmacist: UNLAWFUL SALE OF LIQUORS BY: FORFEITURE OF LICENSE.** For the unlawful sale of intoxicating liquors, the commissioners of pharmacy may revoke the certificate of a registered pharmacist and strike his name from the register.
2. **Commissioners of Pharmacy: ACT CONFERRING POWERS UPON: CONSTITUTIONALITY.** The creation of a board of pharmacy, with the powers conferred thereon by chapter 75, Acts of Eighteenth General Assembly is not void, as being an attempt to delegate the powers which the constitution vests only in the legislature.
3. ———: **REVOCATION OF LICENSE BY: DUE PROCESS OF LAW.** Plaintiff's certificate as a pharmacist was revoked, and his name stricken from the register, by the commissioners of pharmacy, upon the record proof of his conviction by a competent tribunal of the unlawful sale of intoxicating liquors. *Held* that he could not complain that he was deprived of his property without due process of law.
4. **Pharmacist: REVOCATION OF LICENSE: UNLAWFUL SALE OF LIQUORS: INTOXICATING AND ALCOHOLIC.** Under § 8 and 9, chapter 75, Acts of Eighteenth General Assembly, a pharmacist's license may be revoked by the commissioners of pharmacy for the sale of either intoxicating or alcoholic liquors.
5. ———: ———: ———: **NUMBER OF OFFENSES.** Under § 8 of the said act, such license may be revoked for a single unlawful sale of intoxicating liquors. *SEEVERS and ADAMS, J J., dissenting.*
6. **Indictment: ALLEGATION OF COUNTY: JUDICIAL NOTICE OF LOCATION OF TOWN.** An indictment which charged that the crime was committed in the town of L, without naming the county, was not defective, where L. was the county seat of the county where the indictment was found; for the court will take judicial notice of that fact.
7. **Certiorari: WILL NOT LIE TO REVIEW DISCRETIONARY ACTS.** Where a board (such as the commissioners of pharmacy) is clothed with power to determine certain facts, its decision cannot be reviewed on *certiorari*, upon the ground that the evidence considered was incompetent or insufficient. *Tiedt v. Carstensen*, 61 Iowa, 334, followed.

Appeal from Polk Circuit Court.

WEDNESDAY, DECEMBER 10.

CERTIORARI to review the action of defendants, who are the

65	339
87	600
65	339
106	564
65	339
1130	109

Hildreth v. Crawford et al., Commissioners of Pharmacy.

commissioners of pharmacy, in striking plaintiff's name from the pharmacy register, and revoking his certificate as a pharmacist. Upon the final hearing, the circuit court dismissed plaintiff's petition, and affirmed the action of the commissioners. Plaintiff appeals.

Parsons & Runnells, for appellant.

Smith McPherson, Attorney-general, for appellee.

BECK, J.—I. The abstract before us shows that the defendants, acting as the commissioners of pharmacy of the state, upon the record of the conviction of plaintiff upon an indictment for maintaining a nuisance, by keeping a place for the sale of intoxicating liquors contrary to law, and by selling intoxicating liquors therein in violation of law, did strike his name from the register of pharmacists, and revoke the certificate issued authorizing him to practice as a pharmacist. The plaintiff, in his petition, complains of the want of authority of the defendants, and of certain alleged illegal acts in the proceeding and judgment in question. The defendants made full return of their doings in the case. The proceedings in the cause, and plaintiff's objections thereto, need not be here more particularly referred to. They will be stated, so far as may be necessary, in the consideration and discussion of the various grounds of objection urged in this court by plaintiff's counsel to the judgment of the circuit court; but, that these proceedings and plaintiff's objections thereto may be understood, it is necessary to set out here with proper fullness the statute under which the proceedings were had, viz., chapter 75, Acts of the Eighteenth General Assembly.

The statute is entitled "An act to regulate the practice of pharmacy, and the sale of medicines and poisons." Sections 1 and 2 forbid any one not a registered pharmacist to conduct any drug-store or apothecary shop, etc., or to compound and dispense prescriptions of physicians, or to retail or dispense poisons for medical use, except under the supervision

of a registered pharmacist. Penalties are provided for the violation of these sections. Section 3 provides for the appointment by the governor of three commissioners of pharmacy, who are authorized "to make by-laws and necessary regulations for the fulfillment of their duties under this act." Sections 4 and 5 provide for the registry of the names of all persons to whom the commissioners issue certificates. Persons in the business when the law took effect, it is provided, shall be registered without examination; others upon examination. These sections contain provisions as to the manner of examination, and other matters that need not be here more particularly referred to. Section 6 relates to fees and other matters not involved in the questions brought to our attention by this case. Section 7 declares that registered pharmacists shall be responsible for the quality of the drugs and medicines they may sell and dispense, and provides penalties for the sale of adulterated articles, and for the striking of the names of offenders from the register. Section 8 is in the following language: "Apothecaries registered as herein provided shall have the right to keep and sell, under such restrictions as herein provided, all medicines and poisons authorized by the National American or United States Dispensatory and Pharmacopœia as of recognized medical utility: provided that nothing herein contained shall be construed so as to shield an apothecary or pharmacist, who violates or in any way abuses this trust for the legitimate and actual necessities of medicine, from the utmost rigor of the law relating to the sale of intoxicating liquors, and in addition thereto his name shall be stricken from the register." Section 9 declares that it shall be unlawful for any person to retail any of the poisons enumerated, except as therein prescribed. The last sentence of the section is as follows: "Nor shall it be lawful for any licensed or registered druggist or pharmacist to retail, or sell, or give away, any alcoholic liquors or compounds as a beverage, and any violation of the provisions of this section shall make the owner or

Hildreth v. Crawford et al., Commissioners of Pharmacy.

principal of said store or pharmacy liable to a fine of not less than twenty-five dollars, and not more than one hundred dollars, to be collected in the usual manner, and, in addition thereto, for repeated violations of this section, his name shall be stricken from the register." Section 10 provides for licensing itinerant vendors of drugs, nostrums, etc. Section 11 provides penalties for procuring, or attempting to procure, registration by false representations, and for conducting the business of selling drugs and medicines without registration. Section 12 declares that the act shall not apply to physicians putting up their own prescriptions.

The plaintiff was convicted upon an indictment which is in the following language: "The said I. F. Hildreth, on the first day of July, A. D. 1880, in the county aforesaid, and daily thereafter, up to the finding of this indictment, did unlawfully keep, own, control, continue, establish and manage a building, in Leon, Iowa, for the purpose and intent of keeping and selling therein, in the state of Iowa, intoxicating liquors, in violation of law, and at the said time and place, and in said building, the said defendant did keep and sell, in the state of Iowa, intoxicating liquors, in violation of law."

II. Counsel for plaintiff insists that the offense for which he was convicted is not contemplated by the statute as a

1. PHARMACIST: unlawful sale of liquors by: forfeiture of license.

ground for the revocation of the certificate of a registered pharmacist, as we understand counsel, for the reason that the defendants had no jurisdiction in the case. The statute provides what class of persons shall hold certificates of registration, and the grounds upon which the certificates shall be revoked. Not only the acquirements of the pharmacists are to be contemplated under the statute, in determining whether he shall receive the certificate, but it provides that the violation of the statute forbidding the sale of intoxicating liquors shall be cause for revoking his registration. This provision is based upon the ground that one who illegally sells intoxicating

liquors is not a fit person to hold a certificate as a pharmacist. There are many valid reasons, which need not be here stated, which doubtless induced the restriction. Now, while the statute relates to the practice of pharmacy and the sale of poisons, it prescribes causes which shall take from the pharmacist the right to hold a license. It matters not whether the intoxicating liquors sold by plaintiff were or were not to be regarded either as medicines or poisons. Their sale by plaintiff was unlawful; and, for the violation of the law in selling them, he became disqualified to hold his registration.

III. The plaintiff insists that "the creation of a board of officers, with legislative and judicial powers, is not only wholly foreign to the subject of the act, as indicated by its title, but is void as an attempt to delegate powers which the constitution vests only in the legislature." (1) The act regulates the practice of pharmacy by declaring the conditions upon which it shall be practiced, and the class of persons thereto empowered. It contains many regulations, which are readily discovered upon reading the statute. It is obvious that these regulations can be applied and enforced only by officers duly authorized by law. The commissioners are such officers. (2) There are no legislative powers intrusted to the commissioners; they can neither make nor unmake a single provision of law. They are charged with the administration of the law, and with no other powers. (3) While in the administration of the law they are intrusted with certain *quasi* judicial powers, they possess none except those of the class which the law confers upon ministerial and executive officers. They exercise discretion which may be *quasi* judicial, just as all officers do. The by-laws and regulations which they are authorized to make pertain to the lawful discharge of the duties imposed upon them. They do not pertain to the rights or liabilities of other persons. (4) It is complained that the commissioners are authorized to exact a license fee. Surely we are not expected to cite authorities to show that

2. COMMISSIONERS OF pharmacy: act conferring powers upon: constitutionality.

the legislature may provide for licensing persons engaged in specified pursuits, and require the payment of a fee therefor by the person accepting a license. Counsel do not deny that the statute, so far as it requires a pharmacist to obtain a license or certificate, is constitutional, but insist that the provision for fees is unconstitutional. They give neither reasons nor cite authorities to support their position. It demands no further attention.

IV. Counsel insist that the proceedings before the commissioners were without authority, and in conflict with the constitution, in that plaintiff thereby is deprived of his property without due process of law. By this they mean that plaintiff was entitled to a trial before some court. Well, defendant had such a trial in the most solemn and formal manner. He was indicted and convicted of violating the law relating to the sale of intoxicating liquors. He had another trial before the defendants to determine whether he had been so convicted, and the fact was established in the manner prescribed by law, *i. e.*, by the production of the record. Here, then, he had two trials. His violation of the law was thus established before the commissioners, who are charged with the duty of giving and revoking certificates of registration. They discharged a plain and imperative duty in revoking plaintiff's certificate.

V. The statute (section 8) declares that the certificate of registration shall be revoked for violation of the law relating to the sale of intoxicating liquors. But counsel say that there is a difference between alcoholic and intoxicating liquors, and that section 9 provides that the certificate shall be revoked for the unlawful sale of alcoholic liquors. So it is; but section 8 authorizes the revocation for the sale of intoxicating liquors. It follows that, as both sections must stand, the revocation may be for the sale of both intoxicating and alcoholic liquors.

VI. Section 9 declares that for *repeated* violations of its provisions the certificate may be revoked. But section 8

3. —: revocation of license by: due process of law.

4. PHARMACIST: revocation of license: unlawful sale of liquors.

Hildreth v. Crawford et al., Commissioners of Pharmacy.

5. — : — : declares that for violations of the law relating to
 — : num-
 — : ber of offenses the sale of intoxicating liquors, without regard
 to the repetition of the offense, the name of the offender shall
 be stricken from the register. Section 9 applies to other
 violations of the law besides the sale of alcoholic liquors. The
 provision as to repeated offenses will be construed to apply
 to them, and not to the sale of intoxicating or alcoholic
 liquors, which is provided for in section 8. By this construc-
 tion both sections stand, and are not in conflict.

VII. It is insisted that the indictment upon which plaintiff
 was convicted fails to show that the offense was com-
 mitted within the jurisdiction of the court in
 which the indictment was found. It will be
 6. INDICT-
 MENT : alle-
 gation of
 county : judi-
 cial notice of
 location of
 town. observed that it alleges that the offense was com-
 mitted in Leon. The court would take judicial

notice that Leon was the county seat of the county wherein
 the indictment was found. But surely the objection could
 not be raised after verdict and judgment, in a proceeding
 involving the enforcement of a penalty based upon the judg-
 ment. This objection, as well as one based upon the claim

that an appeal was pending in the case wherein
 plaintiff was convicted at the time of the hearing
 7. CERTIORA-
 RI : will not
 lie to review
 discretionary
 acts. before defendants, and another based upon the
 incompetency of the judgment as evidence in the case, pertain
 to questions of fact, which were for the determination of
 defendants. They are not based upon questions of jurisdic-
 tion, or of illegal acts of defendants. The competency and
 sufficiency of the evidence were before defendants for con-
 sideration, and they did not act illegally or without jurisdic-
 tion in deciding thereon. They may have erred in their
 decision, but their error cannot be reviewed upon *certiorari*.
Tiedt v. Carstensen, 61 Iowa, 334.

We reach the conclusion that the circuit court rightly
 dismissed plaintiff's petition. The judgment appealed from
 is, therefore, **AFFIRMED.**

SEEVERS, J., *dissenting*. Being unable to agree to the

foregoing opinion, it is proper that I should briefly state the grounds of my dissent. For the purposes of this opinion, I concede the constitutionality of the statute considered in the foregoing. As I understand the opinion of the majority, it holds that the commissioners of pharmacy were authorized to revoke the license of the plaintiff as a pharmacist under section 8 of chapter 75 of the Acts of the Eighteenth General Assembly. It will be observed that that section provides that, if the pharmacist violates or abuses in any way the law relating to the sales of intoxicating liquors, his name shall be stricken from the register of pharmacists; and section 9 provides that for repeated violations of that section the name of the registered pharmacist may be stricken from the register. Section 8, in my opinion, should be construed as meaning that the name of the pharmacist shall be stricken from the register as provided in the chapter; that is, for "repeated violations of the law," as provided in section 9.

The provisions of the statute in relation to the sale of intoxicating liquors are peculiar, and contain provisions not to be found in any other criminal statute. Of these provisions, however, no just complaint can be made by the courts. But, as the plaintiff could not, when his name was stricken from the register, continue the legitimate business of selling drugs and medicines, the statute should not be so construed as to deprive him of such right, unless it quite certainly appears that such is the legislative intent. Now, in my judgment, so far from this being so, it clearly appears, I think, that the druggist must persistently violate the statute; or, at least, that it must appear that the statute has been violated in more than a single instance, before the name of a registered pharmacist can be stricken from the register.

Mr. JUSTICE ADAMS unites in this dissent.

HIGHTOWER V. OVERHAULSER ET AL.

1. **School Districts: CHANGE OF BOUNDARIES: MANDAMUS TO COMPEL DIRECTORS TO ACT ON PETITION FOR.** Where plaintiff and others, residents of the district township of M., petitioned the directors of said district, and also the directors of the adjoining independent district of E., to have certain territory in which they lived detached from the district township and attached to the independent district, and the directors of the independent district had acted favorably to the petitioners, but the directors of the district township refused to act at all, *held* that *mandamus* would lie to compel them to act in the premises.

65	347
86	073
65	347
96	302

2. ———: ———: ———: **ESTOPPEL: FACTS NOT CONSTITUTING.** In such case, plaintiff was not estopped by the facts that a year before he had presented a similar petition to the same board, and that they then took action thereon, refusing to change the boundaries, and that he failed to appeal from such decision, as he might have done, though the location of the school-houses in his district remained the same.

REED and ADAMS, J J., *dissenting*.

Appeal from Madison Circuit Court.

WEDNESDAY, DECEMBER 10.

THIS IS AN ACTION OF MANDAMUS. The defendants constitute the board of directors and officers of the district township of Madison. It is alleged in the petition that said district township is situated within the civil township of Madison, and includes all the territory thereof except section 6; that the independent district of Earlham was formed originally out of the townships of Penn and Madison, and includes said section 6 of Madison township; that on the seventeenth of September, 1883, plaintiff and others petitioned the board of directors of the independent district of Earlham and the district township of Madison to attach certain territory, then within the district township of Madison, to the independent district of Earlham; that the board of directors of the latter district granted the prayer of the petition, and on the same day notified the board of directors of the district township of Madison, then in regular session, of its action, and requested said board to concur

Hightower v. Overhauser et al.

in this action; but that said board refused and neglected to take any action upon said petition and request, and adjourned until October 6; and that at its meeting on the latter date it also neglected to take any action thereon. It is also alleged that plaintiff is a resident of the territory sought to be attached, and that he is damaged and hindered in the matter of school facilities for the proper education of his children, by the refusal of defendants to take action on said petition and request, and that he has no plain, speedy, or adequate remedy in the ordinary course of the law, and the prayer is that a peremptory writ of *mandamus* issue, commanding defendants to take action on said petition and request. The answer admits all the allegations of the petition, except that defendant is damaged by the refusal to take action on said petition, and that he has no remedy in the ordinary course of the law. And it is alleged that at the regular meeting of said board, in September, 1882, a petition was presented to it by plaintiff, asking for the same relief, accompanied by a written notice from the board of directors of the independent district of Earlham, advising it that said board had granted the prayer of said petition, and requesting it to concur in such action; and that afterwards said board of directors took action on said petition and request, and refused to consent to the attaching of said territory to the independent district of Earlham, and that plaintiff is barred and estopped from enforcing the action by reason of these proceedings. A demurrer to these affirmative allegations was sustained by the circuit court, and, defendants refusing to plead further, judgment was entered against them, from which they appeal.

Dabney & Guiher, for appellants.

Wilkinson & Goodale, for appellee.

SEEVERS, J.—The trial judge has certified that this case involves the determination of two questions of law upon which it is desirable to have the opinion of this court. In

effect, these questions are: (1) whether, upon the facts as they are alleged in the petition and admitted in the answer, the action of *mandamus* will lie to compel the board of the district township to act on the petition of the plaintiff, and the request of the board of the independent district, that it concur in the action of the latter board with reference to the proposed change in the boundaries between the two districts; and (2) whether the action of the district township in 1882, in denying plaintiff's petition, and refusing to concur in the action of the board of the independent district with reference to said proposed change, bars and estops plaintiff from maintaining the action of *mandamus*, he having failed to appeal to the county superintendent from the order then made, there being no change in the meantime in the location of the school-houses in the district township.

The first question we shall consider is whether, under the facts above stated, the defendants can by *mandamus* be compelled to act upon the request made.

I. It is provided by statute that "the action of *mandamus* is one brought in a court of competent jurisdiction, to obtain an order of such court commanding an inferior tribunal, board, corporation, or person to do or not to do an act, the performance of which the law enjoins as a duty resulting from an office, station, or trust. The order of *mandamus* is granted on the petition of any private party aggrieved." Code, § § 3373, 3377. It is further provided by statute that "the boundaries between a district township and an independent district may be changed at any time with the concurrence of their respective boards of directors." Code, § 1809. Counsel for the appellants insist that no duty is enjoined on the defendants by the section of the Code last quoted. But the board of directors of a district township are vested with jurisdiction, and the right to concur in or agree to a change of the boundaries of the district; and from any decision of the board in relation thereto an appeal may

1. SCHOOL-DISTRICTS: change of boundaries: mandamus to compel directors to act on petition for.

Hightower v. Overhauser et al.

be taken to the county superintendent. Code, § 1829. Any person desiring a change in the boundaries of a school-district must apply in the first instance to the board of directors of the respective districts. If they, or one of them, refuse to make the change, the person aggrieved thereby may appeal, and thus obtain rights denied him by the board. If, however, the board simply declines to act, then no appeal can be taken, and the party is remediless, unless *mandamus* will lie. The fact that the requisite power and jurisdiction are conferred on the board to decide the question when presented, and from their decision an appeal will lie, implies that a duty is enjoined on the board in respect thereto. It is true that the board cannot be compelled to act in any particular manner. They have a discretion in the premises which, it may be conceded, cannot be controlled by the courts; but whatever determination the board may make can be set aside or affirmed on appeal. All the courts can do is to compel the board to act, to the end that an appeal will lie. * In principle, the case is like *Albin v. Board of Directors*, 58 Iowa, 77; the only essential difference being that in the cited case it was held that the board had no discretion whatever, while in the present case the only relief asked is that the board shall exercise the discretion vested in it as provided by the statute.

II. The second question to be determined is whether the plaintiff was estopped by his failure to appeal from the refusal of the board to make the change in the boundaries of the district upon his petition the preceding year. It is said that no change in the condition of the district was shown; that the prior action of the board amounts to an adjudication which is final and conclusive. Whatever may be the general rule on this subject in the courts, we feel clear that it should not be applied to school boards. Our school system is not based on any such rigid rules. It is true, the plaintiff acquiesced in the prior decision, but this did not prevent him from asking the board, at the proper time, to examine the matter again, and at least

2. — : ———
 — : estop-
 pel: facts not
 constituting.

act on the matter of the petition. The individuals composing school boards may be yearly changed, and their duties are largely legislative instead of judicial; and we do not think they should be estopped by any prior action taken by them, unless, possibly, private rights would be thereby injuriously affected.

AFFIRMED.

REED, J., *dissenting*. I do not concur in the conclusion reached by the majority in this case. In my opinion, plaintiff is in no position to invoke the aid of the order of *mandamus*.

The remedy by *mandamus* in this state is statutory. It is provided by section 3373 that "the action of *mandamus* is one brought in a court of competent jurisdiction to obtain an order of such court commanding an inferior tribunal, board, corporation, or person to do, or not to do, an act, the performance or omission of which the law enjoins as a duty resulting from an office, station, or trust." Section 3777 is as follows: "The order of *mandamus* is granted on the petition of any private party aggrieved, without the concurrence of the prosecution of the state, or on the petition of the state by the district attorney, when the public interest is concerned, and is in the name of such private party, or of the state, as the case may be, in fact, brought." And section 3778 provides that "the plaintiff in such action shall state his claim, and shall also state facts sufficient to constitute a cause for such claim, and shall also set forth that the plaintiff, if a private individual, is personally interested therein, and that he sustains, or may sustain, damage by the non-performance of such duty."

* * *

It is manifest from these provisions, as I think, that the order of *mandamus* will issue on the petition of a private individual, commanding a public officer, or board of officers, to do a particular act, only in cases when the act is enjoined by the the law as an official duty, and plaintiff is interested

in the performance of that duty, and does or may suffer damage by reason of its non-performance. The remedy is allowed private parties for the protection or enforcement of their personal rights under the law, and they must be aggrieved by the act or omission complained of, in the sense that they are or may be damaged thereby, with reference to some right or privilege which they are entitled under the law to enjoy, or they cannot invoke the aid of this extraordinary remedy.

It is held by the majority that it was the duty of defendants to take action on plaintiff's petition, either granting or denying his prayer, and that, by their refusal to act upon it, he is deprived of the right of appeal to the county superintendent. It is said that the duty of defendants in the premises arises under section 1809, and the right of plaintiff is created by section 1829. The former section is as follows: "Whenever an independent district has been formed out of a civil township or townships, as herein contemplated, the remainder of such township, or each of such townships, as the case may be, shall constitute a district township as provided in section 1713, and the boundaries of such district township and independent district may be changed, * * * with the concurrence of their respective boards of directors." By this section the question whether changes in the boundaries between the districts shall be made is left to the discretion of the boards of directors, and no change therein can be made except with the concurrence of both boards. The board of directors of each district has the right to concur in any proposed change of the boundaries, or to refuse to concur therein, as to it shall seem to the best interest of the district. The whole question is left to its discretion, and when it has taken action thereon it cannot be said, whatever its action may have been, that it has neglected or refused to perform its duty in the premises. As the proposed change in question could be made only with the concurrence of defendants, their refusal to take any action on the proposition was equivalent to an express refusal to concur; for such refusal to take action

left the question in precisely the same situation as it would have been placed in by an express refusal to concur. It seems to me clear, then, that it cannot be said that defendants have refused to perform their duty in the premises. They have simply refused to concur in the proposed change, and it was their right to refuse to concur therein.

But it is said that, by refusing to take action on the proposition, they deprived plaintiff of the right to appeal to the county superintendent, as he could not appeal until some order was made by them. The right of appeal from an order or decision of the board of directors is given by section 1829, which provides that any person aggrieved by any decision or order of the district board of directors, in matter of law or fact, may appeal therefrom to the county superintendent. But it is manifest, I think, that plaintiff would not have been aggrieved in any legal sense by any order which defendants might have made in the premises, for the reason that it cannot be said that, upon any state of facts which might have existed, he had the legal right to demand that the change in the boundaries should be made. He, undoubtedly, had the right to demand that the board of directors of the district township should afford him such school facilities as were reasonable. But he did not have the legal right to demand that the boundaries between the two districts be so changed as that he would be included in the independent district, however superior its facilities may have been. And, in addition to this consideration, as the whole question is left to the discretion of the board, it cannot be said that any order it might have made on the proposition would have involved the determination of any question of either law or fact. *Albin v. Board of Directors*, 58 Iowa, 77, cited in the majority opinion, is not at all in point. That case arose under section 1798, which provides that a change in the boundaries between districts shall be made on a given state of facts, on the petition of two-thirds of the citizens of the territory to be affected by the proposed change. The petitioners in that case are enti-

Prouty v. Tallman et al.

tled to the change as matter of right, while, under the statute in question in this case, the question is left to the discretion of the boards of directors.

In my opinion the judgment of the circuit court ought to be reversed.

ADAMS, J., concurs in this dissent.

 PROUTY V. TALLMAN ET AL.

1. **Tax Deed: LEVY OF TAXES TO SUPPORT: EVIDENCE OF.** The provision of section 38, chapter 152, Laws of 1858, that the levy of taxes, when made, should be recorded "in the proper book," was directory only; and where no such entry was made in the proper book, but a sufficiently full record of the levy, signed by the officers whose duty it was to make the same, was found among the old papers in the auditor's office, such papers were competent evidence of the levy, in support of a tax deed based upon a sale for the taxes so levied. *Higgins v. Reed*, 8 Iowa, 298, followed.
2. **Former Adjudication: AGAINST GRANTOR: GRANTEE NOT BOUND BY.** An adjudication against a grantor of land to the effect that he has no title, in an action begun after he has deeded to another, does not bind those holding under such deed.

Appeal from Humboldt District Court.

WEDNESDAY, DECEMBER 10.

ACTION in equity to quiet the title to real estate. Decree for the plaintiff, and defendants appeal. •

II. Boies and J. L. Husted, for appellants.

A. E. Clark, for appellee.

SEEVERS, J.—I. Both parties claim to own the real estate in controversy. The plaintiff's title is based on a sale for the delinquent taxes of 1860, and a treasurer's deed made in pursuance of the sale. The defendants are owners of the patent title. The defendants

1. TAX deed:
levy of taxes
to support:
evidence of.

Prouty v. Tallman et al.

claim that the tax deed is void because there was no levy of taxes for the year 1860, and rely on a former adjudication. It was held in *McCready v. Sexton*, 29 Iowa, 356, that a levy of taxes is essential to the validity of a tax sale, and that the deed is only presumptive evidence of the levy. In *Moore v. Cooke*, 40 Iowa, 290, it was held that a valid levy cannot be established by parol, and that, if no record of a levy can be found in the proper office, the presumption that there was a levy, arising from the deed, is overcome. To the same effect is *Early v. Whittingham*, 43 Iowa, 162.

The statute in force under which the levy was made is chapter 152 of the Acts of (1858) the Seventh General Assembly, and section 38 of said chapter provides that "the board of equalization shall levy the requisite taxes for the current year in accordance with law, and shall record the same in the proper book." The record-book containing the proceedings of the board of equalization for the years 1859 and 1861, and the record of the board of supervisors for subsequent years, show that taxes were duly levied for said years; but the record-book of the board of equalization fails to show a levy of taxes for the year 1860. Is it essential that the levy be entered or recorded in a book kept for that purpose, or is the statute in this respect directory? In *Higgins v. Reed*, 8 Iowa, 298, the question was whether it is essential to the validity of a school tax levied or voted by a school-district that the proceedings should be recorded in a book; and it was held that the statute was directory only, and in that case the only record evidence of the levy was "kept on half sheets and quarter sheets of paper not bound in book form," and the tax was held to be valid. The same rule must prevail in this case, and therefore the statute must be regarded as directory, and that it is not essential to the validity of the tax in question that it was entered or recorded in the book kept for that purpose.

II. The plaintiff introduced in evidence the tax deed, and the following papers, writings or records:

“ State of Iowa, Humboldt County:

“ According to the requirements of the revenue law, John E. Cragg, acting county judge, Charles Bergk, treasurer, and Nathaniel S. Ames, county surveyor, met as board of equalization, at the county seat of said county, for the purpose of fixing the rate of taxes for the year 1860, viz.: County tax, four (4) mills; school tax, one (1) mill; bridge tax, for paying interest on county bonds issued by the county, two (2) mills.

“ In testimony whereof, we have hereunto set our hands and seals this twenty-fourth day of September, A. D. 1860.

“ N. S. AMES, County Surveyor,

“ CHARLES BERGK, Treasurer,

“ JOHN E. CRAGG, Acting County Judge.”

The foregoing writing is on an “ordinary sheet of legal-cap paper,” and it was found nearly a year prior to the trial, in the auditor’s office, “among old papers on file in that office.” The plaintiff also introduced in evidence the following writing:

“ The undersigned, board of equalization of assessments for Humboldt county, met this second day of April. Present: John E. Cragg, acting county judge, and Charles Bergk, county treasurer.

“ After duly examining the returns of the assessors of the different townships, we would report that we find the several assessments to be fair and equal, and would recommend no change necessary.

“ Witness our hands this second day of April, A. D., 1860.

“ JOHN E. CRAGG, Acting County Judge.

“ CHARLES BERGK, County Treasurer.”

This writing is on an “ordinary sheet of legal-cap paper,” and it was found among the papers in the auditor’s office. The plaintiff introduced evidence showing that the signatures of Cragg, Bergk and Ames, appearing on the foregoing papers, were their genuine signatures. The plaintiff further

introduced in evidence the tax-list for 1860, and contends that the evidence aforesaid is sufficient record or written evidence that there was a levy of taxes for the year 1860, and that the presumption arising from the execution of the deed is so strengthened thereby as to overcome the presumption that there was no levy, because none appears in the record-book of the board of equalization. The board, at that time, was composed of the officers whose names are signed to the foregoing papers. Section 31, chapter 152, Acts 1858. The foregoing writings, on their face, purport to have been executed more than twenty years preceding the trial in the court below, and were found in the proper office, and in the custody of the proper officer. The signatures thereto of the officers charged with the duty of levying taxes are genuine, and the writings sufficiently show that they performed that duty. Having been found in the auditor's office, among old papers on file, they must be regarded as records or papers of such office, and we do not understand counsel to claim otherwise; but their contention is that they are not sufficient record evidence of a levy of taxes, which they insist can only be shown by the introduction of the book in which the proceedings of the board of equalization are recorded. But, as we have seen, the statute in this respect is directory; and we are unable to distinguish this case from *Higgins v. Reed*, before cited. The evidence in this case is much more satisfactory that there was a levy which was reduced to writing, and which is a record belonging to the proper office, than the evidence in that case, which was held to be sufficient to show a levy of taxes. We therefore follow it. The levy was undoubtedly made, but not entered in the proper book. This case is clearly distinguishable from *Hintrager v. Kiene*, 62 Iowa, 605. It is proper to say that the validity of this same tax was involved in *Moore v. Cook*, before cited. In that case, however, there was no record or written evidence of the levy.

III. The adjudication relied on is that in *Moore v. Cooke*. The plaintiff was not a party to that action, but one under

2. FORMER
adjudication :
against
grantor:
grantee not
bound by.

whom he claims was. The county treasurer conveyed the land in controversy to Pitt Cook in 1865, but it will be conceded that said conveyance was void on its face, because it showed that the sale of the land was in bulk, and for a gross sum of several parcels of land which were not contiguous. Cook conveyed to D. R. Jackman in 1865. Afterwards, in 1867, the treasurer made another conveyance of the land to Cook. The sufficiency of this deed to vest the title in Cook is in no manner assailed, except that it is claimed that there was no levy of taxes to support the sale and deed. Conceding that Cook had no title when he conveyed to Jackman in 1865, assuming that he got a title for the first time in 1867, such title inured to and became vested in Jackman. Code, § 1931. Jackman conveyed to Emily W. McGraw in 1869, and her heirs conveyed to the plaintiff in 1879. Jackman was a defendant in *Moore v. Cook*, but the decree was not entered in that case until 1873, and it is not claimed that the action was commenced while Jackman had the title to the lands. Mrs. McGraw's deed was recorded in April, 1869, but the recorder entered it in the index-book as Emily W. McGraw. This, however, does not make any difference. Neither Cook nor Jackman owned the land when the action in which the decree pleaded as an adjudication was commenced, and they were the only defendants. It seems to us to be too clear for controversy that neither the plaintiff nor Mrs. McGraw is bound by such adjudication.

IV. We do not understand counsel for the appellants to insist in argument that this action is barred by the statute of limitations. What they do claim is that appellant's right to insist that the tax-deed is void is not barred by the statute.

AFFIRMED.

THE J. I. CASE THRESHING-MACHINE CO. v. HAVEN.

1. **Sale of Machine: FAILURE OF WARRANTY: CHOICE OF REMEDIES: DAMAGES: EVIDENCE: PRACTICE IN SUPREME COURT.** The vendee of personal property which has been sold with warranty as to its quality, has the election, on the failure of the warranty, to rescind the contract, by returning the property and demanding back the consideration received by the vendor, or to retain the property and sue for the damages sustained in consequence of the failure. (See cases cited in opinion.) But where he elects to keep the property, and he is sued for the contract price, he must pay that price, less the amount of the damages which, by a preponderance of the evidence, he shows that he has sustained; and where he fails so to establish the extent of his damages, he is entitled to only nominal damages; and in such case a judgment against him for the whole contract price will not be disturbed on appeal, as this court will not remand a case for the assessment of merely nominal damages.
2. ———: ———: **MEASURE OF DAMAGES.** The measure of the vendee's damages in such case is the difference between the value of the property as it actually was, and what its value would have been had it been as warranted. (See cases cited.)
3. ———: ———: **VALUE OF MACHINE: JUDICIAL NOTICE OF.** Where in such a case the only evidence of the actual value of the machine was that of the vendee, who testified only that it was of no value, and the machine in question was a steam threshing-machine, *held* that such testimony could not be taken as true, because the court will take judicial notice that such a machine is of some value, though possibly useless for the purpose for which it was designed.

Appeal from Howard District Court.

WEDNESDAY, DECEMBER 10.

Action on four promissory notes, and to foreclose a mortgage given to secure the same. The notes were made payable to J. I. Case & Co., and were assigned to plaintiff. Defendant admitted the execution of the notes, but averred that they were given in renewal of other notes given by him to J. I. Case & Co. for the price of a steam threshing-machine, and the appurtenances and fixtures belonging thereto, which said firm sold to him; that they warranted said machine to be well made, of good materials, and durable with proper care, and to do as good business in threshing and

65	359
79	17
79	566
65	359
86	622
65	359
87	581
65	359
88	729
65	359
96	280
65	359
102	314
65	359
122	711
65	359
129	483
65	359
134	256

cleaning grain as any other machine of the same size manufactured in the United States, and that there was a failure of the warranty, and that the machine was worthless, and that he was damaged by said failure of warranty in a large amount, and that said notes were assigned to plaintiff after maturity, and that it had notice when it purchased them of the equities between the original parties growing out of the transaction in which the notes were given. Plaintiff admitted in its reply that the notes were given in renewal of other notes which plaintiff had given for the price of the threshing-machine sold him by J. I. Case & Co., but denied the other averments of the answer. The district court rendered judgment for plaintiff for the amount of the notes and for the foreclosure of the mortgage. Defendant appeals.

McCarty & McCook and *James O. Crosby*, for appellant.

Cooley & Akers, for appellee.

REED, J.—A number of questions have been argued by counsel which we do not find it necessary to consider. For the purposes of the case, it may be conceded that it is established by competent evidence that there was a warranty by J. I. Case & Co. of the machine for the price of which the original notes were given, and that there has been a failure of that warranty, and that defendant did not waive his claim for the damages consequent on the breach, by renewing the notes with knowledge that such breach had occurred. The vendee of personal property which has been sold with warranty as to its quality, on the failure of the warranty, has the election to rescind the contract by returning the property and recovering back the money received by the vendor, or to retain the property and sue for the damages sustained in consequence of the failure. *Aultman v. Theirer*, 34 Iowa, 272; *Rogers v. Hanson*, 35 Id., 283; *McCormick v. Dunville*, 36 Id., 645. Defendant elected to pursue the latter course. He retained the property, and at the time of the trial had it in

his possession. His answer, then, was in the nature of a counter-claim for the damages which he sustained in consequence of the failure of the warranty. His claim, it is true, was against the vendor of the property, but he alleged that plaintiff took the notes subject to his counter-claim, and he sought to set off the amount of his damages against the notes in its hands. The burden was on him to establish the amount of damages which he sustained in consequence of the failure of the warranty, and this he has not done. The measure of his damages is the difference between the value of the property as it actually was, and what its value would have been had it been as warranted. *Pitsinowsky v. Beardsley*, 37 Iowa, 9; *McCormick v. Vanatta*, 43 Id., 389.

The property in question consisted of an Eclipse separator, with thirty-six-inch cylinder, with apron and thimble-skein trucks, and straw-stacker, and a ten-horse steam-power, and such levers, braces, brace-rods, tumbling-rods and belts as are usually furnished with such machines. The price agreed to be paid for it was \$1,816, and defendant testified that if it had been as warranted its value would have been that amount. He used the property for four years, during the threshing season, and he also used the steam-power at other times in sawing lumber. The principal defect complained of was in the cylinder to the engine, which permitted the escape of steam, and thereby caused a waste of power. There was also some difficulty with the separator, and this caused the grain to waste to some extent.

Defendant testified that the machine, in the condition in which it was, had no value, and he is the only witness who gave his testimony directly on the question of its value. It is insisted that, as the witness was neither impeached nor contradicted by any other witness, his statement must be accepted literally. But we think we are not required to do this. The facts proven show that the statement is not literally true, and we do not believe the witness intended that it should be so understood. What he meant, probably, was

that, owing to the defects in the machine, it could not be operated to advantage or with much profit. But the fact that he continued to use it in his business for four years shows quite conclusively that he regarded it as of some value. Besides this, it is a fact so generally known that we will take judicial notice of it, that much of the material of which a machine of that kind is constructed has a value quite independent of the machine. Large quantities of iron enter into its construction, and this would be of some value for other uses, if the machine was broken up entirely. And separate parts of it, such as the belts, braces, tumbling-rods, brace-rods, and the like, could be used to advantage in the construction of other machines. So that, if it should be conceded that the machine in question had no value as a threshing-machine, or that owing to its defects it could not be operated to any advantage in threshing grain, it does not follow that it was worthless. As we have seen, defendant had the election, when he discovered the failure of the warranty, to rescind the contract, or keep the property and pay the contract price, and look to the vendor for the amount of the damages which he sustained in consequence of the failure. He chose the latter remedy. He is therefore required to pay the contract price. But he is permitted to recover the amount of his damages. But he has failed to prove this amount. He gave the court no *data* from which the amount could be determined. All that could be claimed from the evidence is that it shows a failure of the warranty, and that he is, therefore, entitled to recover nominal damages on his counter-claim. But we will not reverse the judgment on the ground that the district court failed to allow him such damages. The judgment of the district court is, therefore,

AFFIRMED.

KEMERER, LAMB & CO. V. BLOOM ET AL.

1. **Chattel Mortgages:** QUESTION OF PRIORITY UNDER PECULIAR FACTS. M. held a first mortgage upon chattels, plaintiffs holding a second mortgage. M. sold the property under his mortgage, and it was bid off by W. at the request of the mortgagor, who told W. that he would furnish the money to pay for the property. He did not, however, furnish the money, but C. did, and the property was delivered to C. A few days thereafter the mortgagor paid C. the amount bid for the property, together with the amount of a debt which he owed him, whereupon the property was delivered to the mortgagor. The mortgagor borrowed the money to pay C., and to indemnify defendant as surety on the note given for the borrowed money, made to him a mortgage on the property. *Held* that the legal effect of the transaction was the same as if the mortgagor had borrowed the money and paid off the first mortgage without the intervention of a sale, and that it advanced plaintiffs' mortgage to a first lien, and that defendant's mortgage was inferior thereto.

WEDNESDAY, DECEMBER 10.

Appeal from Buchanan Circuit Court.

ACTION on a promissory note executed by defendants, John W. Bloom and W. T. Price, and to foreclose a chattel mortgage given by said Bloom to secure the same. It is alleged in the petition that defendant; Jacob Bloom, claims a lien on the mortgaged property, but that whatever interest he has therein is junior and inferior to plaintiff's mortgage thereon. The relief prayed by the petition as against Jacob Bloom is that plaintiffs' mortgage be decreed senior and superior to any claim or right of his in the property. There is also a prayer for general relief. Jacob Bloom alone answered. He admitted that he claimed an interest in said property, and he alleged that when the mortgage under which plaintiffs claim was executed, the property was covered by a mortgage given by said John W. Bloom to the McDonald Manufacturing Company, to secure a debt which he was owing said company; that afterwards this mortgage was foreclosed by notice and sale of the property, and that one R. Campbell was the

purchaser of the property at said foreclosure sale; that subsequently John W. Bloom purchased the property from Campbell, and after such purchase gave him a mortgage thereon to indemnify him against liability on a promissory note which he had signed as surety for said John W. Bloom; and he alleges that the lien created by this mortgage is superior to any interest of plaintiff therein. Plaintiffs, in their reply, admit that the property was covered by the McDonald mortgage when their mortgage was executed, but deny that Campbell was the purchaser of the property at the foreclosure sale, but allege that John W. Bloom was the real purchaser thereof; that he procured the money to make the purchase from Campbell, but that the latter never had title to the property. They also allege that the sale under the McDonald mortgage was made without any notice as required by statute, and that no notice was given them of said sale. The judgment of the circuit court was for the defendant. Plaintiffs appeal.

Woodward & Cook, for appellants.

J. H. & R. J. Williamson, for appellees.

REED, J.—At the sale under the McDonald mortgage, the property was bid in by one A. B. Worden, who attended the sale and bid on the property at the request of John W. Bloom. He was told by Bloom, when he requested him to attend the sale, that he (Bloom) would furnish the money to pay for the property. The money was not given to Worden, but after the sale the person who conducted it was informed that Campbell would pay the amount of the bid. He accordingly went to Campbell, and he paid him the money. The property was delivered to Campbell, but within a few days thereafter John W. Bloom paid him the amount of Worden's bid at the sale, together with the amount of a debt which he previously owed him, and the property was then delivered back to him. Bloom borrowed the money which he paid to Campbell in this

transaction at a bank, on the day of the transaction, and gave his note for the amount, with Jacob Bloom as security thereon, and, to indemnify him against this note, he gave Jacob the mortgage under which he now claims the property. These facts are all clearly proven, and they show clearly enough that there was some previous agreement or understanding between Campbell and John W. Bloom with reference to the advancement of the money and the purchase of the property at the foreclosure sale. But neither of the parties was examined on the trial, and the question as to the character of that understanding or agreement is left to be determined from the circumstances.

We think the most reasonable inference from all the circumstances is that the agreement was that the money was to be advanced by Campbell, and the property purchased at the sale for the benefit of John W. Bloom, and that Campbell was to have the possession of the property as security for the amount advanced and the debt then owing him by Bloom, but that the latter should have the right to use the property for the purpose of raising the money necessary to repay the amount advanced and satisfy the former debt. All the conduct and acts of the parties indicate that this was the nature of their agreement and understanding. The transaction, then, was not a purchase of the property at the mortgage sale by Campbell, but a loan by him to Bloom of the amount of money, and a pledge by the latter of the property as security for the amount of this debt. Campbell acquired no right or interest in the property under the foreclosure proceedings, but whatever right or interest he acquired in it was by virtue of the contract with Bloom, and the delivery of the property to him thereunder; and we need not inquire as to the character of the right so acquired, for, whatever its extent or character was, it terminated on the payment by Bloom of the debt secured by the pledge and the redelivery of the property to him. And the payment of the amount of Worden's bid, being made by Campbell merely as an advancement of that

The State v. Stone.

amount of money to Bloom, operated simply as a payment by Bloom of his debt to the McDonald company, and consequently as a satisfaction of the mortgage given to secure that debt. The formality of offering the property for sale and bidding it in did not have the effect to vest Bloom with any new title or interest in it; but, after the form of sale had been gone through with, he had the same interest in the property which he would have had if he had paid the mortgage debt without any sale having been attempted. The senior mortgage having been satisfied without a foreclosure, and without divesting the mortgagor of his interest in the property, plaintiffs' mortgage remains a first lien upon it. And whatever interest was acquired by Jacob Bloom under his mortgage is junior to plaintiffs' mortgage. The judgment of the circuit court is therefore erroneous, and it is

REVERSED.

THE STATE V. STONE.

1. **Criminal Law: CONTINUANCE FOR ABSENCE OF WITNESS: FACTS ENTITLING TO.** It appearing from the record in this case that the defendant had used due diligence to secure the attendance of a material witness, and had shown reasonable excuse for not at an earlier day making an application for a continuance on account the absence of such witness, *held*, in view of the circumstances of the case, (see opinion,) that the court erred in overruling his application, and that the judgment of conviction should be reversed.

Appeal from Bremer District Court.

WEDNESDAY, DECEMBER 10.

THE defendant was tried and convicted for the larceny of a certain sorrel mare, and he appeals.

Gibson & Dawson and *S. T. Richards*, for appellant.

Smith McPherson, Attorney-general, for the State.

ROTHROCK, CH. J.—The indictment against the defendant was presented at the December term, 1882. The defendant was arraigned, and pleaded not guilty, and by consent the cause was continued for the term. On the second day of the next term, which commenced April 2, 1883, the defendant filed a motion for a continuance, on the ground of the absence of a witness. The motion for a continuance was overruled. Thereupon the defendant filed an amended motion for a continuance, which, on the third day of the term, was overruled. The defendant excepted to the ruling, and now insists that the same was erroneous, and greatly to his prejudice. The state objected to these applications for continuance, upon the grounds that they were not made before noon of the second day of the term, and because the motions did not show sufficient diligence to procure the attendance of the witness.

The mare in question was stolen from a pasture, and soon thereafter she was found in the possession of the defendant, at the village of Brush Creek, in Fayette county, where the defendant traded or exchanged her for another horse. The defendant did not deny these facts, but his defense was that, while traveling on foot from Plainfield to Edgefield, he purchased the mare from a man who stated his name to be White, and that one Dean was a traveling companion with defendant, and was present when he bought and paid for the mare. He claimed to be able to prove these facts fully by Dean, and it was to procure his testimony that he asked the continuance. The affidavits for continuance show that the defendant commenced to search for Dean about the twelfth of March, 1883, in order to secure his attendance at the trial. If the affidavits state the truth, this search was continued with reasonable diligence up to the time of the trial. It was stated in the affidavits that, on the Saturday before the commencement of court on Monday, defendant ascertained that said witness had removed from Wadena to about fourteen miles from Calmar, in Winneshiek county. The defendant

and his attorney resided eighty-five miles from Waverly, where he was tried, and they show what appears to us to be a reasonable excuse for not being present and making the application for a continuance at an earlier period than they did.

We think the motion for a continuance should have been sustained. It appears to us that the cause should at least have been continued to a later day in the term, to give the defendant an opportunity to produce the man Dean, if there was any such man, and the affidavits in support of a motion for continuance cannot be controverted. We are the more ready to make this ruling and give the defendant another trial, because three of the most important witnesses for the state were not examined before the grand jury, and no notice that they would be called as witnesses was given to the defendant until the twenty-third day of March, 1883, a very few days before the trial. And we may further say that the defendant proved beyond question that his character for honesty and integrity was good up to the time the mare was stolen. We do not wish to be understood as holding that a man of good character may not commit crime, but such a man is much less likely to put up a false application for the continuance of a criminal charge against him than a professional thief would be to do so.

REVERSED.

BROOKS v. WESTOVER.

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1. **Practice on Appeal: TRIAL DE NOVO: INSUFFICIENT ABSTRACT.** A trial *de novo* cannot be had in this court upon an abstract which does not purport to be an abstract of all the evidence.
2. **Error without Prejudice: NO GROUND FOR REVERSAL.** Where it is clear that an appellant could not possibly have recovered, the overruling of interlocutory motions made by him, though technically erroneous, will not justify a reversal.
3. **Malicious Prosecution: COUNTER-CLAIM FOR DAMAGES.** No action can be maintained for a malicious prosecution until the action complained of is ended. Hence the damages for such prosecution cannot be set up as a counter-claim to the alleged malicious action.

Appeal from Chickasaw Circuit Court.

WEDNESDAY, DECEMBER 10.

ACTION in equity to enforce the specific performance of an alleged contract, on the part of defendant, to convey to the plaintiff certain land at \$16 per acre. The defendant denied the contract as alleged, but admitted an oral contract to sell the land to plaintiff at \$20 per acre. The defendant also filed a counter-claim for damages alleged to have been sustained by reason of the malicious institution and prosecution of the action. The plaintiff dismissed his petition, and the case was submitted on the counter-claim, and judgment was rendered against the defendant for costs. He appeals.

M. E. Billings, for appellant.

No appearance for appellees.

ADAMS, J.—The defendant presents the case as triable *de novo*, and also upon assigned errors. We have to say that the case cannot be tried *de novo*, for the reason that the abstract does not purport to be an abstract of all the evidence. The defendant, we presume, relies in this respect upon a certificate of the judge, which purports to have been attached to
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the evidence. But that would only show that the evidence was made of record. It can show nothing in respect to the abstract. The plaintiff, after dismissing his petition, filed an unverified reply to the defendant's verified counter-claim. The defendant moved to strike the reply from the files, on the ground that it was filed too late, and was not verified.. He also moved for default. The court overruled the motions, and the defendant assigns the ruling as error. In one view, perhaps, as a rule of pleading, the motion should have been sustained; but we do not think that we should be justified in reversing for that reason. We are unable to see how the defendant could ultimately recover. The damages claimed cannot properly be set up in a counter-claim. No action can be maintained for a malicious prosecution until the action complained of is ended.

AFFIRMED.

CROSBY V. FLOETE, TREASURER, ETC.

1. **Tax: REBATE AFTER PAYMENT, UNDER CODE, § 800: AUTHORITY OF TREASURER TO REFUND.** Where the board of supervisors rebates a tax for any of the reasons named in § 800 of the Code, and the tax has been paid when such rebate is made, the county treasurer has no authority to refund such tax without an order to that effect from the board of supervisors. Whether a warrant from the auditor would not also be necessary, *quaere*.

Appeal from Clayton District Court.

WEDNESDAY, DECEMBER 10.

THIS is an action to compel the defendant, who is county treasurer, to repay to plaintiff certain taxes, which it is alleged he was authorized to repay by an order of the board of supervisors. A demurrer to the petition was sustained, and plaintiff appeals.

Crosby v. Floete, Treasurer.

James O. Crosby, for himself.

John Larkin, for appellee.

ROTHROCK, CH. J.—The amount in controversy is less than \$100, and the cause comes to us upon the following certificate of the trial judge: “In a case under section 800 of the Code, when the board of supervisors order the rebatement of part of a tax, if such tax had been paid at the time such order of rebatement was made, is it necessary, in order to authorize and require the county treasurer to repay the amount so rebated, that the board of supervisors should make a further order directing the treasurer to refund the same?” Section 800 of the Code is as follows: “The board of supervisors shall have power to rebate, in whole or in part, the taxes of any person whose building, crops, stock, or other property has been destroyed by fire, tornado, or other unavoidable casualty, if said property shall not have been sold for taxes, or if said taxes have not been in default for thirty days at the time of the destruction. * * * ”

This section, as we understand it, applies more particularly to the rebate, reduction, or discount of an existing tax, than the refunding or paying back of taxes which have been paid by the tax-payer. Where a tax-payer appears before the board of supervisors and shows that his taxes should be reduced or rebated under this section of the statute, and the board of supervisors order the rebatement, there is nothing to be done by the treasurer but to make a proper correction on his tax books and collect the balance of the tax. But, where a tax-payer makes his application under this statute after he has paid his taxes, we think the treasurer may well refuse to pay money out of the treasury, without an order of the board directing him to do so. He may at least require such an order, and it is doubtful whether he would be authorized in making payment without a warrant from the auditor. The rule is that money is not to be paid from the treasury without an order or warrant, and we find noth-

Hibbard, Spencer, Bartlett & Co. v. Everett et al.

ing in any of the statutes cited by counsel which would authorize the holding that the refunding of taxes should be excepted from this rule. It is true, the law authorizes the treasurer to make payment of state funds, school funds, etc., without the order of the board; but we find no provisions of the statute authorizing the treasurer to refund a tax already paid without an express order of the board.

The ruling we make is in accord with the ruling of the learned district judge, and the judgment is

AFFIRMED.

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106	69
65	372
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HIBBARD, SPENCER, BARTLETT & CO. V. EVERETT ET AL.

1. **Garnishment: LIABILITY OF GARNISHEE ON ANSWER.** A garnishee cannot be held liable upon his answer, unless he therein clearly admits his indebtedness to the principal defendant.

Appeal from Buchanan Circuit Court.

WEDNESDAY, DECEMBER 10.

THIS is a proceeding by garnishment. The cause was tried without a jury, and the garnishee was discharged. Plaintiffs appeal.

Charles E. Ransier, for appellants.

Lake & Harmon, for appellee.

BECK, J.—The garnishee, F. J. Everett, in an answer to the proceeding, denied indebtedness to the defendant. Thereupon he was further examined, and testified that he held a chattel mortgage executed by defendant upon a certain stock of merchandise, the possession of which he had taken under the mortgage, and, after adding certain goods to the stock, and selling from the stock thus enlarged, he caused the goods mortgaged to be sold by the sheriff, in order to foreclose the mortgage. The sum realized at the foreclosure sale was less than the

Wells v. Lawrence et al.

amount of the debt, costs of the sheriff's sale, expenses incurred, and the costs of the goods added to the stock by the garnishee. Plaintiffs insist that the amount of the item last enumerated should not be deducted from the sum realized from the foreclosure sale, for the reason that the new goods were not sold thereat. This claim is based upon counsel's understanding of the garnishee's evidence, and there was none other at the trial. Counsel on the other side claim that the new goods were sold by the sheriff, and they insist that the fact appears in the garnishee's evidence. In order to reach either of the conflicting conclusions of the parties, resort must be had to the construction of the garnishee's testimony. We are unable to adopt the conclusion that the garnishee clearly admits that the amount of the new goods was excluded from the sale by the sheriff. Unless it be held that he admitted this to be the fact, the conclusion cannot be reached that he admits indebtedness to defendant. To hold him liable, his answer must contain a clear admission to that effect. *Morse v. Marshall*, 22 Iowa, 290.

It is our opinion that the circuit court rightly discharged the garnishee.

AFFIRMED.

WELLS V. LAWRENCE ET AL.

1. Mortgage Foreclosure: DEFENSE OF PAYMENT: QUESTION OF FACT.

This being an action for the foreclosure of a mortgage, it is triable *de novo* in this court; and the only question being one of fact as to the payment of the mortgage debt, the evidence is considered, and held to establish the defense of payment.

Appeal from Delaware Circuit Court.

WEDNESDAY, DECEMBER 10.

THIS is an action to foreclose a mortgage upon certain real

estate. The defense is that the promissory notes secured by the mortgage, of which notes the plaintiff claims to be owner, have been fully paid. The circuit court found that the defense of payment was established by the evidence, and rendered a judgment for the defendants for costs. Plaintiff appeals.

J. M. Brayton, for appellant.

E. M. Carr and Bronson & Le Roy, for appellee.

ROTHROCK, CH. J.—The case is triable anew in this court. The question of payment is purely one of fact, to be determined by the testimony of the witnesses and the written evidence in the case. We have carefully examined every fact presented to us, and have reached the conclusion that the decree of the circuit court is correct. The facts are somewhat complicated, and it is unnecessary to set them out and discuss the evidence.

AFFIRMED.

BROWN V. BYAM ET AL.

1. Vendor's Lien : FACTS ENTITLING TO: CONSPIRACY TO CHEAT VENDOR.

Plaintiff sold defendants a farm for the consideration of \$1,600, of which \$600 was paid in cash, and for the residue of which defendants were to convey to him certain village property, valued at \$1,000. But, at plaintiff's suggestion, defendants, for the time being, retained the legal title to the village property, but gave to plaintiff a bond for a deed therefor. Afterwards, through a conspiracy with another, (for the facts see opinion,) and by fraudulent representations as to the value of a certain railroad bond of the face value of \$1,000, defendants induced plaintiff to accept the bond, which proved to be worthless, in lieu of a deed for the village property. Held that the last transaction did not amount to a sale of the village property to defendants, but only to an agreement to accept the bond, instead of a deed to the village property, in part payment for the farm, and that, the bond being worthless, and having been imposed upon plaintiff by the fraud of defendants, it did not amount to a payment on the farm, and that plaintiff was entitled to have a ven-

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Brown v. Byam et al.

dor's lien established on the farm for the \$1,000. Compare *McDole v. Purdy*, 23 Iowa, 277.

2. **Evidence: DEPOSITION MAY BE USED BY EITHER PARTY.** Where a deposition was taken by defendants, and other depositions were taken by plaintiff to rebut the testimony given in the deposition taken by defendants, and defendants afterwards gave notice that they would not introduce their deposition, *held* that it was competent for plaintiff, nevertheless, to introduce *all* the depositions, for the purpose of establishing facts material to the issue.
3. —: **SUBORNATION OF PERJURY: INFERENCE AGAINST SUBORNER.** One who procures another to give false testimony in support of a point in issue, inferentially admits thereby that he cannot establish the point by truthful testimony.

Appeal from Delaware Circuit Court.

THURSDAY, DECEMBER 11.

THIS is an action in equity to establish a vendor's lien on real estate. It is alleged in the petition that in 1866 plaintiff, being the owner of a farm of 100 acres, in Delaware county, entered into a contract with defendants for the sale of said farm to them at the price of \$1,600; that it was agreed between the parties that plaintiff would accept, in part payment for said farm, either certain village property in the town of Cascade, in Dubuque county, or a tract of 95 acres of land in Crawford county, as he should determine, after making an examination of the Crawford county land; that he did examine said land, and determined to accept the Cascade property, and so notified defendants; that he executed and delivered to defendant, Esther J. Byam, a warranty deed for the farm, and they gave him a bond for a deed for the property in Cascade, and paid him \$600, that being the difference between the price of the farm and the price at which he was to take the Cascade property; that afterwards, and before any conveyance of the Cascade property was executed, they conspired and confederated with a person, who was unknown to plaintiff, to cheat and defraud him; that, in pursuance of this conspiracy, said stranger approached plaintiff.

iff and represented to him that he desired to purchase said tract of land in Crawford county, and induced him to go with him to defendants for the purpose of effecting such a purchase; that the stranger then offered to purchase said land, and pay the sum of \$1,000 therefor; that defendants then requested plaintiff to sell said land to the stranger, and accept and keep the price which he offered to pay for the same, and permit them to retain the Cascade property, and agreed that if he would do this they would convey the Crawford county land directly to the stranger; and that, relying upon the honesty and good faith of the parties, plaintiff consented and agreed that he would accept said sum of money, and permit defendants to convey said land to said stranger, and retain the Cascade property; that defendants and said stranger then induced plaintiff to accept a railroad bond for \$1,000, in lieu of that amount of money, by the representations that said bond was valid and well worth its par value, and that, relying upon this representation as true, he did consent to accept said bond, and then and there delivered to defendants their bond for a conveyance of the Cascade property, and they executed a conveyance of the Crawford county land to said stranger; that plaintiff afterwards learned that said railroad bond was utterly worthless, and that the Crawford county land was not in fact sold to said stranger, and that the whole transaction and pretense of selling the same was in pursuance of the fraudulent scheme entered into between them and said stranger to cheat and defraud plaintiff, by inducing him to accept said worthless railroad bond in part payment of said farm; and the prayer is for judgment for the amount of the bond, with interest, and that a vendor's lien therefor be established on said farm.

Defendants, in their answer, admit the sale and conveyance by plaintiff to defendant, Esther J. Byam, of said farm, at the price and on the terms alleged in the petition. They also admit the conveyance by them of the Crawford county lands to one A. Wilkinson, but deny that there was any con-

spiracy or arrangement between them and said Wilkinson to cheat or defraud plaintiff; but, on the contrary, allege that plaintiff represented to them that said Wilkinson, who was a stranger to them, was a friend and acquaintance of his, and that he requested them to sell said lands to him, (plaintiff,) and take as payment therefor said lots in Cascade, and that they consented to this, and at plaintiff's request conveyed the Crawford county land to said Wilkinson, but that they had no knowledge as to what consideration Wilkinson was paying plaintiff therefor. The suit was commenced in June, 1872, and was tried and submitted in October, 1876, when a judgment was entered for defendants. Subsequently, plaintiff filed a petition to vacate this judgment, on the ground that it was obtained by defendants by fraud, and in May, 1881, an order was entered, setting aside the judgment and granting a new trial. On the final hearing, the district court entered judgment for plaintiff for \$1,000, and established his vendor's lien therefor on said farm. Defendants appeal.

Blair & Norris, for appellants.

Welch & Welch, for appellee.

REED, J.—I. The allegation in the petition that there was a conspiracy between defendants and the man Wilkinson, to whom the conveyance of the Crawford county lands was made, is not supported by direct or positive testimony. To establish it, plaintiff relies solely upon circumstantial evidence. The evidence is quite voluminous, and the circumstances relied on to establish said allegation are quite numerous. We do not deem it necessary to set out in this opinion either the evidence or the separate circumstances which we think are established by it, but content ourselves with the statement of the ultimate facts which we think are proven. We are satisfied by the evidence that the transaction in which plaintiff surrendered to defendants the bond for a deed to the Cascade property

1. VENDOR'S
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and received the railroad bond, and defendants executed the conveyance of the Crawford county lands to Wilkinson, was brought about by the contrivance of the defendant, Philander Byam, and was in execution of a scheme which he had devised to cheat and defraud plaintiff, by inducing him to accept said railroad bond (which was worthless) in lieu of the Cascade property. We are also satisfied that this co-defendant, who is his wife, knew of this scheme, and was a party to it, and assisted in its execution. We are also satisfied that the deed which defendants executed to Wilkinson was never delivered to him, but was retained by defendants, and was subsequently filed for record in the office of the recorder of deeds of Crawford county by Philander Byam, and that this was done when this suit was about to be instituted, and was for the purpose of giving an appearance of honesty to the transaction in which the deed was executed. We are also satisfied that since the transaction, and for the purpose of consummating their wicked scheme of fraud and securing its fruits, the defendants have resorted to the crime of perjury and subornation of perjury, and, in addition to this, Philander Byam has committed the crime of forgery for the purpose of consummating the same end. That plaintiff, under the law, is entitled to some relief against a wrong perpetrated by such means and for such purposes, would seem clear. That he is entitled to a money judgment against defendants, is clear. But it is insisted by counsel that he is not entitled to a vendor's lien on the farm sold to the defendants for the amount of such judgment.

The evidence shows that, when plaintiff elected to accept the Cascade property in part payment for the farm, defendants offered to execute a conveyance of that property to him, but that, for reasons of his own, he preferred that the legal title to the property should be held by defendant, Esther J. Byam, in whom it then was, and the bond for the execution of a deed in the future was accordingly given him, instead of an absolute conveyance. The position of counsel for

defendants is that the execution of this bond operated to vest plaintiff with the equitable title to the property, and from the time of its execution Esther J. Byam was simply a trustee holding the naked legal title to the property, and that the contract for the sale of the farm to defendants was then fully executed, and plaintiff had then received the full price which defendant agreed to pay him therefor, and that the transaction was, in effect, no more than an exchange of the Cascade property for the railroad bond.

If it should be conceded that the contract for the sale and purchase of the farm was fully executed, and that the payment by the defendant of the \$600, and the delivery of the bond for the deed to the Cascade property, operated as a full payment of the price of the farm, it would follow, necessarily, that plaintiff would not be entitled to a vendor's lien on the farm to secure the indebtedness which arose out of the final transaction between the parties. For the law gives the vendor a lien for the purchase money only of the property on which the lien is given, (Story, Eq. Jur., § 1217,) and, if the final transaction is to be treated merely as a sale by plaintiff to defendants of the Cascade property, it is very clear that he is not entitled to a lien on the farm to secure the debt created by that sale. But we think that was not the real character of the transaction. The delivery of the title bond to plaintiff cannot be treated as the equivalent of an absolute conveyance of the property to him. Defendants' contract was to convey the Cascade property to plaintiff in part payment for the farm, and that conveyance, when made, was to operate as payment of a specified amount of the price. Until the conveyance was made, it cannot be said that that portion of the price was paid.

The situation of the parties, then, was this: Defendants were under obligation to convey the property to plaintiff in satisfaction of \$1,000 of the price of the farm. But the conveyance had not yet been made. The contract with reference to the sale and purchase of the farm in that respect was not

yet executed. In the final transaction, it was agreed that plaintiff should accept the railroad bond instead of the conveyance of the property, and that defendants should retain the latter. This amounts to no more than an agreement by plaintiff to accept the bond instead of the property in payment of that portion of the price of the farm which was to have been paid by the conveyance of the property. And it was not in any proper sense a sale of the property by him to defendants. As the bond was worthless, its delivery did not operate to satisfy the portion of the price of the farm which it was agreed should be paid by its delivery. Plaintiff, consequently, is entitled to a vendor's lien for that portion of the price, and that is what is given him by the judgment of the district court. This view is sustained by *McDole v. Purdy*, 23 Iowa, 277; *Bradley v. Bosley*, 1 Barb., Ch., 125.

II. On the first trial of the case, it was shown that, on the same day on which the deed from defendants to Wilkin-
2. EVIDENCE: son was filed for record in the recorder's office, in
depositions may be used
by either
party. Crawford county, an instrument was also filed
which purported to be a deed from Wilkinson to
one E. C. Lewis, conveying to him the land in Crawford county.
Plaintiff also introduced the deposition of the notary public
before whom said deed from Wilkinson to Lewis was
acknowledged, and he swore that, since taking said acknowl-
edgment, he had seen the defendant, Philander Byam, and
was satisfied that he was the identical person who appeared
before him and represented that his name was A. Wilkinson,
and signed and acknowledged said deed to Lewis. To rebut
this evidence, defendant introduced a deposition, which was
taken on commission before a notary public in Jackson
county, and which purported to be the deposition of E. C.
Lewis, and in which the witness swore that he was the E. C.
Lewis to whom said conveyance was made, and that he was
acquainted with Wilkinson, and knew that he was the person
who appeared before said notary public, and signed and
acknowledged said conveyance.

On the hearing of the petition for a new trial, plaintiff introduced the deposition of one Samuel Hinton, who swore that he is the person who appeared before the notary public in Jackson county, and personated E. C. Lewis, and gave the testimony which was taken in the deposition by the notary as the testimony of E. C. Lewis, and that his statements therein were false, and that he was induced by the solicitations of defendant, Byam, to go before the notary and give said testimony, and that Byam instructed him as to the answers he should give to the questions which should be asked him. Before the last trial, defendants gave notice that they would not introduce said deposition of E. C. Lewis in evidence. On the trial, however, plaintiff introduced said deposition. They also introduced the deposition of Hinton, and those of other witnesses, whose testimony tends to corroborate Hinton in certain respects.

Defendants now insist that this evidence is incompetent, and should not be considered. We think otherwise. The depositions had been regularly taken during the progress of the cause, and they might be introduced by either party for the purpose of establishing any fact material to the case. If it is true that defendant is the person who personated Wilkinson in the execution of the deed to Lewis, this is a material fact. It shows that he had that deed in his possession, and, as it and the deed to Wilkinson were filed for record on the same day, which was but a few days after the deed to Lewis was acknowledged, and as it is otherwise shown that defendant was in Crawford county at about that time, the reasonable conclusion is that he also had the Wilkinson deed in his possession, and that he is the person who filed said deeds for record. The deeds were filed for record nearly four years after the Wilkinson deed was executed, and defendants swore that they had never seen Wilkinson since the day it was executed, so that, if defendant is the person who filed that deed for record, the conclusion is certain that it never was delivered, which is a very material fact in determining the

The State, ex rel. Hart, v. Rosencrans, Sheriff.

character of the transaction in which it was given. Defendant's act in procuring Hinton to personate Lewis ought to be treated as an admission by him that no such person as Lewis exists, and when he deliberately procured that witness to falsely swear that he (plaintiff) was not the person who executed and acknowledged the deed from Wilkinson to Lewis, he inferentially admitted that the fact could not be proven by the testimony of any witness who would swear to the truth concerning the transaction. Men do not resort to false witnesses or false testimony for the purpose of establishing the truth. Subornation of perjury is resorted to only for evil purposes. We have, therefore, regarded the evidence contained in these depositions as both competent and material, and we have considered it in reaching our conclusion in the case.

The judgment of the district court, we think, is right, and it is

AFFIRMED.

THE STATE, EX REL. HART, v. ROSENCRANS, SHERIFF.

1. **Practice in Supreme Court:** CONSTITUTIONAL QUESTIONS CONSIDERED WITH RELUCTANCE. This court will not undertake to determine constitutional questions which do not necessarily arise in a case, and where a party assails the constitutionality of a law, and comes here as appellant, the court will scrutinize with more than ordinary strictness the record which he brings, to determine whether a constitutional question is necessarily involved.
2. **Habeas Corpus:** PRISONER AGAINST SHERIFF: AGREED RECORD INCOMPETENT. Where a prisoner is held to answer to the grand jury, and he claims that the evidence on which he was committed is insufficient in law, and on such ground sues out a writ of *habeas corpus*, it is not competent for him and the sheriff to agree, in the petition and answer, as to what the evidence was; and on such showing the plaintiff herein was properly remanded to the sheriff's custody.

Appeal from an Order of R. G. Reiniger, Circuit Judge.

THURSDAY, DECEMBER 11.

The State, ex rel. Hart, v. Rosencrans, Sheriff.

THIS proceeding, entitled as above, was instituted by Hart, for the purpose of obtaining a writ of *habeas corpus*, and his discharge thereon from the defendant's custody. The writ was issued, and an answer and return were made thereto. Upon a hearing having been had, the prayer for release was denied, and the plaintiff was remanded into custody. He appeals.

Blythe & Markley and *P. J. Dougherty*, for appellant.

Smith McPherson, J. B. Cleland and *J. J. Clark*, for appellee.

ADAMS, J.—The appellant sought to effect a release from the custody of the defendant, Rosencrans, as sheriff of Cerro Gordo county. The record shows that he had been brought before one H. H. Cummings, a justice of the peace, on a charge of maintaining a nuisance in the use made of a certain room, by keeping whisky, wine and beer, and other intoxicating liquors, therein, with intent to sell the same in violation of law. As to what order the magistrate made, the record is silent; but both parties have treated the case as if the order was that Hart be held to answer to the charge against him. A bail-bond was given by him, and afterwards the surety upon the bail-bond surrendered him. The defendant, in his answer and return, sets up such bail-bond and surrender in his defense. The illegality of the restraint is said to consist in the insufficiency of the evidence to justify the magistrate's order. It is not denied that the evidence would be sufficient, but for the fact, as is alleged, that the law under which the charge was made is unconstitutional, so far as it applies to beer which was the property of the person charged, and on hand in his place of business, before the law took effect; and it is said that the evidence shows only that the appellant was keeping beer with intent to sell the same, and that all the beer thus kept by him was his property, and was in his place of business, to-wit, in the room complained

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of as a nuisance, on the third day of July, 1884, which was before the law under which the proceedings were instituted took effect.

Our rule is never to undertake to determine a constitutional question unless the case is one in which such question neces-

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sarily arises. It does not appear upon what ground the circuit judge refused to discharge the appellant; but we think that the judge could not properly have reached the constitutional question. Section 3449 of the Code provides that the petition for a writ of *habeas corpus* must state the place where the applicant is restrained of his liberty, and section 3450 provides that the petition must be sworn to by the person confined, or some one in his behalf. The petition in this case does not state the place where the appellant was restrained. As to whether the petition was sworn to by the appellant, or some one in his behalf, is only a matter of conjecture. It may have been; but the record before us does not show that it was. We find appended to the petition, as set out in the abstract, only these words: "subscribed and sworn," etc. If the petition itself showed no more than the record before us shows, the circuit judge would have been justified in refusing upon that ground to discharge the appellant. We should not, it is true, ordinarily, take notice of such objection where not noticed by the appellee; but where a party assails the constitutionality of a law, and comes into this court as appellant, we are justified in scrutinizing the record which he brings here with considerable strictness.

Another objection remains to be stated. The appellant was charged with keeping whisky, as well as wine and beer.

2. HABEAS
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oner against
sheriff:
agreed record
incompetent.

For aught the record before us properly shows, the appellant may have been held for keeping whisky; and it is not claimed that the law in question is unconstitutional in its application to whisky, though held as property, and on hand, July 3, 1884. Following what purports to be a copy of the petition, a certain

The State, ex rel. Hart, v. Rosencrans, Sheriff.

statement as to what the evidence showed is set out in these words: "Also the testimony of John Gotlieb, William Hudson, Frank Lantz, R. E. Owen and J. C. Norton, for the state, showing that the defendant kept a restaurant and saloon on the fourth day of July, 1884, and that he sold beer therein on that day, at North Plymouth, in said county. Also the testimony of H. W. Hart, in his own behalf, that all the beer kept or sold by him was a portion of his stock that remained on hand on the third day of July, 1884." These words, we infer, were attached to the petition. They not only follow the copy of the petition in the abstract, but we find in the petition a statement that a transcript of all the evidence is attached to it. On the trial before the circuit judge, no testimony or evidence of any kind was introduced. The appellant relied upon his own statement, as contained in the petition, as to what the evidence showed, and upon the answer and return of the sheriff. The latter averred that the minutes of the testimony, as set out in the plaintiff's petition, are substantially correct, and furnish the reason for his detention by the defendant. We have, then, a case made up by the prisoner and the sheriff in their own way, to test the legality of the imprisonment. That this is not allowable is manifest. Such a method of obtaining a discharge, if sanctioned, would become the favorite method of every person held to answer under a charge of crime. The person restrained would make up his own statement as to what the evidence showed; and if he could get the sheriff to admit that the statement is substantially correct, and that it is by reason of such evidence that he restrained the applicant, the question as to the sufficiency of the evidence would be made to depend upon the applicant's construction of it. The statute nowhere contemplates that the applicant is to put a construction upon the evidence, nor has the sheriff anything to do with it. It is for the court or judge to determine what the evidence was, after the same has been produced in the manner contemplated by the statute. Nor was it true, as the sheriff returned, that he held the applicant

Smalley v. Mores et al.

by reason of the evidence. It was his duty to hold him, regardless of the evidence, until he was legally discharged.

The evidence upon which the applicant was held to answer not being properly brought before the judge, he did not, we think, err in refusing to discharge him.

AFFIRMED.

SMALLEY V. MORES ET AL.

1. **Mortgage: PURCHASE OF LAND WITH AGREEMENT TO PAY: FACTS CONSTITUTING PAYMENT.** Defendants purchased land encumbered by a mortgage, and agreed to pay the mortgage. Plaintiff afterwards came into possession of the note secured by the mortgage, and brought this suit to recover on defendants' promise to pay it. The trial being to the court, *held* that the evidence (see opinion) tended in some degree to establish the defense of prior payment, and that the finding and judgment of the court to that effect could not be disturbed.
2. **Evidence: OPINION OF WITNESS: ERROR WITHOUT PREJUDICE.** A question calling for the legal conclusion of the witness should be ruled out; but in this case, where the trial was to the court, and the witness not only answered the question as asked, but proceeded to state all the facts upon which his answer was based, *held* that the error in allowing the question to be answered was without prejudice.

Appeal from Bremer Circuit Court.

THURSDAY, DECEMBER 11.

THIS is an action at law, by which the plaintiff seeks to recover of the defendants upon an alleged agreement, made by the defendants, to pay off and discharge a promissory note and mortgage upon certain land. The defendants purchased the land of the mortgagors, and it is claimed that they assumed the payment of the mortgage. The defendants claim that they have made full settlement and payment of their obligation. There was a trial by the court, without a jury, which resulted in a judgment for the defendants. Plaintiff appeals.

E. L. Smalley, for himself.

Gibson & Dawson, for appellees.

ROTHROCK, CH. J.—I. In April, 1870, George Wicks and Norman F. Wicks executed and delivered to Thomas Mickley

1. MORTGAGE: their promissory note for \$1,600, due in five
 purchase of
 land with
 agreement
 to pay: facts
 constituting
 payment. years, with 10 per cent per annum interest, the
 interest payable annually. At the same time
 they executed and delivered to Mickley a mort-
 gage upon eighty acres of land to secure the payment of the
 note. In September, 1870, George and Norman F. Wicks
 sold and conveyed the land to the defendants herein. The
 conveyance was by a deed of general warranty, excepting
 as to the mortgage, and it was recited in the deed that the
 defendants herein were to pay and satisfy the mortgage.
 This deed was filed for record September 15, 1870. The
 mortgage was foreclosed for the first three annual install-
 ments of interest, and John G. Hoster became the purchaser at
 the foreclosure sales, and sheriff's deeds were afterwards
 made to him. The note and mortgage were assigned by
 Mickley, the payee, to Hoster, January 2, 1871, and at the
 time of the foreclosure sales Hoster was the owner of the
 claim.

It appears that said eighty acres of land, together with two or three hundred acres of other lands, had been previously encumbered by mortgages. These mortgages were foreclosed, and the land sold, and on the eighth of June, 1874, the period of redemption was about to expire. As we understand the record, these prior mortgages had been executed by said Mickley, who formerly owned the land. It required \$4,200 to redeem from these prior foreclosures. On the eighth day of June, 1874, Mickley, Hoster, and the defendants Mores, met at Waverly, and an arrangement was effected by which all the land was redeemed from the prior liens. The redemption was made in the name of Mickley, with money furnished by Hoster, and Mickley immediately conveyed all of the land to Hoster. Hoster was then the holder and owner of the Wicks note, or that part of it which had not been paid by the foreclosure of the mortgage to secure it. On the

same day, and, as it seems to us, as a part of the same transaction, Hoster executed to the defendants Mores a receipt, of which the following is a copy:

“WAVERLY, IOWA, June 3, 1884.

“Received from W. H. Mores and A. S. Mores one dollar, in full of all demands, of every nature whatsoever, against W. H. and A. S. Mores in and to the following described premises, to-wit: [Here follows a particular description of the eighty acres of land included in the Wicks mortgage.]

[Signed]

“JOHN G. HOSTER.”

It is claimed by the defendants that this receipt was intended to be a full release of all their liability upon the note in question. This the plaintiff denies, and claims that the plaintiff did not then know that the defendants were liable upon an assumption of the mortgage debt. The circuit court held that the receipt, in connection with the oral evidence in the case, showed that the claim was then fully settled. The case turns upon this question of fact, and we are required to determine whether the judgment of the circuit court finds support in the evidence. And it must be understood that we are required to apply the same rule to the judgment that we do to the verdict of a jury. Upon the direct question as to whether it was actually stipulated between the parties that the defendants' obligation was then and there canceled, the evidence is in conflict. We do not propose to set it out or review it. We must not be expected to do more than announce our conclusion.

It is urged that the release, if one was made, was without consideration. The court was warranted in finding from the evidence that the defendants loaned \$1,500 to Hoster to make up the amount necessary to redeem, and that it was agreed between the parties that, in consideration of this loan, the defendants were released from their obligation. It is true, this appears to be but a meager consideration; but there are other circumstances to be taken into account. It is probable that Mickley was the only party entitled to redeem. The

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time for redemption was about to expire, and Mickley claims that the receipt was made for his benefit, as well as the benefit of the defendants. Hoster acquired title to a large body of land, and it may be thought that he could well afford to release the defendants, if thereby he could obtain the land. There is another very strong circumstance which we think the court probably considered. Hoster was then the holder of the note, and there was evidence to the effect that he did not deliver the note to the defendants, because he wanted to use it and the mortgage in extinguishing the claim of one Hickard upon the land. He held the note for about eight years after this settlement was made, and assigned it to one Kinne, and he assigned to the plaintiff. It does not appear that in all this time any claim was made upon the defendants.

II. One of the defendants, while under examination as a witness, was asked this question: "State whether or not at that time you had a full and complete settlement with John G. Hoster, and whether or not it was the intention, at the time this receipt was given, to release you and A. S. Mores from all liability on this \$1,600 Wicks note and mortgage in question." This question was objected to as incompetent and improper. The objection was overruled, and the plaintiff excepted. The question was plainly improper, as calling for the conclusion of the witness. But, in view of the answer of the witness, and in view of the fact that the trial was before the court and without a jury, we think the plaintiff suffered no prejudice therefrom. The answer was, "Yes, sir;" and the witness immediately proceeded to state all the facts in connection with the transaction.

The judgment of the circuit court will be

AFFIRMED.

MYER & DOSTAL V. WHEELER & CO.

1. **Sale: OF BARLEY BY SAMPLE: WARRANTY: FACTS CONSTITUTING: DIVISIBLE CONTRACT: RESCISSION OF.** Plaintiffs sold to defendants ten car-loads of barley, like sample, to be delivered from time to time on track at C., for transportation to D., where defendants resided. Defendants were to pay seventy cents per bushel for each car-load when so delivered. Defendants had never seen the barley. Upon receipt of the first car-load, defendants refused to pay for same, because it was not equal to sample, but informed plaintiffs that they had given them credit for sixty-five cents per bushel therefor, and that they would withhold payment until the ten car-loads were delivered. They also urged them to ship the remainder of the barley, and promised to honor their drafts for future shipments. Plaintiffs refused to ship any more barley on the terms proposed, but offered to continue the shipments if the first car-load was paid for. *Held* (1) that the contract amounted to an express warranty that the barley should be equal to the sample; (2) that the contract was severable, and that the refusal to pay for the first car-load did not entitle plaintiffs to rescind, and to refuse to deliver the other car-loads; (3) that plaintiffs were entitled to recover for the actual value of the car-load delivered, and that defendants were entitled, on their counter-claim, to recover damages for the failure to deliver the other nine car-loads. *BECK, J., dissenting.*
2. ———: **WITH AND WITHOUT WARRANTY: EFFECT OF KEEPING INFERIOR GOODS.** Where goods are sold without warranty, to be paid for on delivery, and the goods prove inferior, if the vendee elects to keep them, he must pay the contract price; but, if sold with warranty as to quality, and the warranty fails, the vendee may keep the goods, and, when sued for the contract price, may by way of counter-claim set up and recover his damages for the failure of the warranty. See authorities cited in opinion.
3. ———: **DIVISIBLE CONTRACT: RESCISSION FOR BREACH.** The rescission of a divisible contract will not be allowed for a breach thereof, unless such breach goes to the whole consideration. See authorities cited in opinion.
4. ———: **FOR FUTURE DELIVERY: FAILURE TO DELIVER: MEASURE OF DAMAGES.** Where grain was sold to be delivered in the future, the measure of damages for non-delivery was the highest market price at the place of delivery between the date when it should have been delivered and the date of beginning suit to recover the damages.

Appeal from Scott Circuit Court.

THURSDAY, DECEMBER 11.

65	390
100	573

65	390
1126	723

65	390
135	312

65	390
136	384

65	390
143	126
143	523
143	528
143	529
143	530
143	532
143	533

PLAINTIFFS brought this action to recover the price of a car-load of barley. They allege in their petition that they contracted with defendants to sell and deliver to them on track, at Calmar, Iowa, ten car-loads of barley, at seventy cents per bushel,—said barley to be of substantially the same quality as certain other barley which they had theretofore sold to defendants,—and that, in pursuance of said contract, they delivered to defendants one car-load of barley, of the value of \$343.87, and that defendants refused and neglected to pay for the same on demand, as they were bound to do by the terms of said contract; and they allege that by this refusal defendants abrogated and rescinded the contract, and released them from the further performance of the same; and they pray for judgment for said amount. Defendants admit the making of the contract for the sale and delivery by plaintiffs to them of ten car-loads of barley, but allege that the same was to be like a sample of barley which plaintiff had previously sold to them at Davenport, and that they were to pay for the same when received in Davenport; and they deny that by any failure on their part to pay for said car-load of barley they rescinded or abrogated said contract, or released plaintiffs from performing it; and, by way of counter-claim, they allege that said sale was with a warranty that the barley should be of like quality with the sample which they had formerly received from plaintiffs, and that the car-load delivered did not correspond with the sample, but was of inferior quality and of much less value, and that when they discovered this they refused to pay for or take the same at the contract price, and that plaintiffs thereupon refused to deliver the other nine car-loads, although requested so to do. By the judgment of the circuit court plaintiffs recovered for the car-load delivered, but a deduction of ten cents per bushel was made from the contract price on account of the inferior quality of the barley, and defendants were awarded damages for the non-delivery of the other nine car-loads. Plaintiffs appeal.

Myer & Dostal v. Wheeler & Co.

Ellis, Murphy & Gould, for appellants.

Bills & Block, for appellees.

REED, J.—The case was tried to the court, and there was a finding of facts. The facts established by the finding of the court, which we deem material to the questions argued by counsel, are as follows: Plaintiffs reside and are engaged in business at Calmar, in this state, and defendants are engaged in business at Davenport. Each of the parties is engaged in buying and selling grain. On the seventh of September, 1881, defendants had in their possession a sample of barley which plaintiffs had sent to them. On that day plaintiffs wrote defendants that they had contracted ten car-loads of barley like said sample, and offered to sell the same, or any portion of it, at seventy cents per bushel, delivered on board the cars at Calmar. On receipt of this letter, defendants telegraphed and wrote plaintiffs that they would take ten car-loads like the sample, at the price named. On receipt of defendants' letter, plaintiffs wrote them that they would "turn out the ten car-loads as fast as possible." This letter was written on the tenth of September. There had been a prior sale by plaintiffs of four car-loads of barley to defendants, in which plaintiffs had the right to deliver one or more car-loads at a time, and draw on defendants for the amount of each separate delivery at the time the same was made. It was understood between them that the ten cars should be delivered, and payments therefor should be made, in the same manner. No part of the barley was delivered until the twenty-first of September, when plaintiffs shipped one car, and drew on defendants for the value thereof at the contract price. Defendants had no opportunity to inspect the barley until it arrived at Davenport. They then found that it did not correspond in quality and condition with the sample. They therefore refused to pay the draft drawn on them by plaintiffs, and immediately wrote them informing them that the barley was not up to the

sample, and that its value was ten cents per bushel less than what it would have been if it had corresponded with the sample; also informing them that they would make an allowance of five cents per bushel thereon. They also informed them of their refusal to pay their draft, and stated that they gave them credit for the car-load of barley at five cents per bushel less than the contract price, and that they would retain this amount in their hands until the remaining nine car-loads of barley should be delivered. In a few days thereafter they again wrote plaintiffs, informing them that they would pay their drafts drawn against future shipments, but reiterating their determination to retain in their hands the amount due on the car-load in question until all the barley should be delivered. Plaintiffs answered these letters, refusing to assent to this arrangement, and urging defendants to send them the amount due for the car-load delivered, and informing them that they would not deliver any more barley until this was done, but expressing a willingness to deliver the balance if this amount was paid. There had been a material advance in the meantime in the market value of barley, and no further deliveries have been made by plaintiffs under the contract.

On these facts the circuit court found, as conclusions of law: (1) that there was an express warranty or agreement that the barley to be delivered should be equal to the sample, for the breach of which defendants are entitled to damages; (2) the failure to offer to return the car-load delivered did not affect the defendants' right to sue for a breach of the agreement or warranty; and (3) the failure to pay for the car-load delivered was not a rescission of the contract, and did not entitle plaintiffs to rescind it. Exceptions are taken by plaintiffs to these conclusions.

I. Plaintiffs' position as to the first and second conclusions is that, as the contract between the parties was wholly executory, to deliver the barley from time to time in the future, no particular barley being specified, the stipulation as to quality is in no proper sense a warranty; that it is an inte-

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gral part of the contract to sell and deliver the barley, and not an undertaking collateral to that, which survives the delivery of the property in pursuance of the contract; and the failure of plaintiffs to deliver barley of the stipulated quality, while it is a breach of their contract, does not constitute a failure of warranty, and consequently, as defendants retained the property, and did not offer to return it, they are now bound to pay the contract price.

We think, however, that the finding of the circuit court that, as to the barley delivered, there was a warranty that it should correspond in quality with the sample, is correct. The parties contracted with reference to the sample. Plaintiffs represented that they had ten car-loads, which was like the sample in quality; and they offered to sell the same to defendants at a certain price, and defendants agreed to take that quantity like the sample at the price named. Defendants had no opportunity to inspect the grain until it arrived at Davenport, and they had incurred the cost of transporting it to that point. Plaintiffs' representation as to the quality of the grain was made for the purpose of inducing defendants to enter into the contract, and they relied upon it, and were influenced by it to make the purchase. Defendants having been induced by these representations to enter into the contract, and the delivery of the car-load in question having been made under these circumstances, plaintiffs must be held to have warranted that the grain corresponded in quality with the sample. If there had been no warranty of the property, defendants, if they elected to keep it, would have been bound to pay the contract price. This is the well-settled rule in such cases. See *Reed v. Randall*, 29 N. Y., 358; *Gaylord Manuf'g Co. v. Allen*, 53 Id., 515; *Dounce v. Dow*, 64 Id., 411; *Gilson v. Bingham*, 43 Vt., 410; *Allison v. Vaughn*, 40 Iowa, 421. But it is equally well settled in this state that, where there has been a warranty of the quality of the goods, and a failure of such warranty, the vendee may retain the property and sue on the warranty. *Aultman v.*

Theirer, 34 Iowa, 272; *Rogers v. Hanson*, 35 Id., 283; *McCormick v. Dunville*, 36 Id., 645; *King v. Towsley*, 64 Id., 75.

II. Plaintiffs contend that defendants, by refusing to pay for the car-load of barley in question, on its delivery, rescinded the contract and released them from the duty of delivering the balance of said barley. That the retention by defendants of the amount due for the car-load of barley delivered was a violation of the terms of the contract cannot be denied. By the agreement between the parties plaintiffs had the right, on the delivery of any portion of the barley on the track at Calmar, to draw on defendants for the value of the amount so delivered, and defendants undertook to pay their drafts for such amounts when presented. A controversy arose, it is true, as to the amount which was due for the car-load in question, but they were not thereby released from the obligation to pay, or, at least, offer to pay, the amount which they admitted was due thereon. By their attempt to retain this amount until the delivery of the balance of the grain, they asserted a right with reference to the subject of the contract which it did not confer upon them, and one to which the other party never assented. We are of opinion, however, that the contract was not rescinded by the refusal of defendants to pay the amount due at the time, when, by its terms, they ought to have paid it, and that plaintiffs were not thereby released from a performance of the unperformed portions of the contract. The contract was severable. When plaintiffs delivered the car-load in question on the track, the contract was thereby so far performed that the rights and obligations of the parties with reference to that car-load were fully established under it. They had then performed one of the series of acts which they undertook to perform, and they were entitled under the contract to compensation for that act. They thereby performed a specific portion of their undertaking, and were entitled, by virtue of the contract, to a definite and certain portion of the consideration, and were in a position

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to enforce the payment by defendants of that portion of it; and their right in that respect was not at all dependent on the performance, either by themselves or defendants, of the other conditions of the contract.

Defendants were not in default as to the unexecuted portions of the contract. Nor did it appear that they ever would be in default as to them. They expressed a willingness to pay for the other nine car-loads as they should be delivered, and there is no claim that they were not able to perform their undertaking in that regard. They did not refuse absolutely to pay for the car-load which was delivered, but claimed the right to retain the price until the others should be delivered, and as security for the performance of the contract by plaintiffs. It was not understood when the parties entered into the contract that plaintiffs were dependent for the means to purchase the subsequent car-loads on the money which they would obtain for those first delivered. Nor is it shown that they were so dependent. We think, therefore, that the circuit court rightly held that plaintiffs were liable for the damages occasioned by their failure to deliver the remaining car loads. The rule established by the decided weight of authority, both in England and in this country, is that rescission of a divisible contract will not be allowed for a breach thereof, unless such breach goes to the whole of the consideration. *Freeth v. Burr*, L. R. 9 C. P., 208; *Mersey Steel & Iron Works v. Naylor*, L. R. 9 Q. B. Div., 648; *Simpson v. Crippin*, L. R. 8 Q. B., 14; *Newton v. Winchester*, 16 Gray, 208; *Winchester v. Newton*, 2 Allen, 492; *Sawyer v. Railway Co.*, 22 Wis., 403; *Burge v. Cedar Rapids & M. R. R. Co.*, 32 Iowa, 101; *Hayden v. Reynolds*, 54 Id., 157. See, also, the collection of authorities on the subject in the note of Mr. Lucius S. Landreth to the case of *Norrington v. Wright*, 21 Amer. Law Reg., 395.

III. On the trial, defendants, for the purpose of proving the damages which they had sustained by the failure of plaintiffs to deliver the nine car-loads of barley, were permit-

ted to produce the market value of barley at Chicago, St. Louis and Davenport. Plaintiffs complained of the ruling admitting this testimony. Their position is that the damages should be assessed with reference to the value of the barley at the place where it was to have been delivered. Conceding this claim, they were not prejudiced by the ruling. The court found, specially, that, while there was no regular market for barley at Calmar, it was worth eighty-five cents per bushel on the track at that place, between the date when plaintiffs ought to have made the delivery and the commencement of the action, and assessed the damages with reference to this finding. We think the judgment of the circuit court is right, and it is

AFFIRMED.

BECK, J., *dissenting*. I. The selling of goods by sample is not strictly a warranty of their quality, though the books sometimes so speak of it. The agreement as to quality, indicated by the sample, is a part of the contract of sale, not a sale and contract of warranty collateral therewith. A vendor sells a car-load of wheat as No. 2, which the buyer has not seen. The designation No. 2, indicating the quality of the wheat, is a description of the grain; it is not a warranty. So, if the seller presents a sample of the wheat, it is simply another method of describing it. In either case, if the wheat does not correspond with the description, the purchaser may not accept it on the contract, for it is not the wheat he bought. Of course, if he does accept it in such a manner, or under such circumstances, as will not be regarded as an admission that the wheat is of the quality described, he is liable for only the market value of the wheat.

II. Under the facts found by the court, defendants were to pay for each load of barley as it was delivered on the track at Calmar. They refused to pay anything for the load delivered, and proposed to keep it or its price "as a margin," in order to enforce the contract of sale. This was a refusal by

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defendants to perform the contract, and authorized plaintiffs to decline to deliver more barley.

In my opinion, upon the facts found by the circuit court, the plaintiffs are entitled to recover judgment for the market value of the barley delivered. Defendants are entitled to recover nothing for the failure of plaintiffs to deliver the other barley sold by the contract. In my opinion, the judgment of the circuit court ought to be reversed.

65 398
88 316

PERKINS & GRAY V. ANDERSON ET AL.

1. **Sale: INDUCED BY FRAUD OF VENDEE: DELIVERY: RESALE BY VENDEE: RECOVERY OF GOODS.** Plaintiffs sold the goods in question to A., who obtained credit therefor by falsely representing that his name was S. The goods were consigned by rail to the name of S., but A., by stating that he was the purchaser, induced the station agent to deliver them to him. A. then sold and delivered the goods to D. & P., who had no knowledge of the fraud. *Held* that the delivery of the goods to A. by the carrier was in effect a delivery by the plaintiffs, and that plaintiffs, having thus voluntarily delivered the goods to A., thereby enabling him to sell to D. & P., could not recover the goods from D. & P., who purchased them in good faith.
2. **Evidence: EXCLUSION OF: ERROR WITHOUT PREJUDICE.** Error in excluding competent evidence is no ground of reversal, where, from the whole record, it is clear that the judgment could not have been different had the evidence been admitted.

Appeal from Shelby District Court.

THURSDAY, DECEMBER 11.

ACTION OF REPLEVIN. The cause was tried to a jury. After the evidence for plaintiffs was submitted, the court, upon motion of defendants, directed the jury to return a verdict for them. Plaintiffs appeal.

Clinton L. Nourse, for appellants.

Smith & Cullison, for appellees.

BECK, J.—I. The petition shows that plaintiffs sold the

goods involved in this suit to defendant, Anderson, upon false and fraudulent representations that his name was Swede, and that he was a merchant doing business in that name; that the goods were shipped to Swede as the consignee; and that he obtained possession thereof through false and fraudulent representations. The other defendants and intervenors in the case set up purchase of the goods from Anderson in good faith, and without notice of the frauds charged by plaintiffs. The plaintiffs introduced evidence tending to prove that their agent or salesman sold the goods in question to Anderson upon his representation that his name was Swede; that Anderson was insolvent, and his standing and reputation were such that the goods would not have been sold to him in his true name, or had he been known to the salesman; that the goods were shipped by railroad, consigned to Swede; and that Anderson, by representing that he was the purchaser, induced the station agent to deliver them to him. It appears that the goods were transferred to Deicks and Pierson, who are made defendants in this action; and it is not disputed that they were good faith purchasers.

II. Counsel for plaintiffs state the following rule of law, which he insists is applicable to the case, and controls its decision: "When a contract for the sale of goods is induced by the frauds of the purchaser, but no delivery is made under the contract, and the purchaser afterwards wrongfully obtains possession of the goods without the assent or knowledge of the seller, the title remains in the seller, not only against the fraudulent purchaser, but also against his vendee, although the latter purchased for a valuable consideration, and without notice of defect in the vendor's title." The correctness of this rule is not disputed by counsel for defendants. Under it plaintiffs cannot recover, for the obvious reason that the goods were delivered under the contract which was induced by Anderson's fraud. Under the contract of sale the goods were shipped, and the carrier was authorized

to deliver them to the purchaser. A delivery by the carrier was a delivery under the contract, with the knowledge and assent of plaintiffs. The fact that they were shipped in the name of Swede, who had fraudulently represented that to be his true name, and thereby obtained credit, did not amount to a direction not to deliver them to Anderson, but was really authority to do so, for the reason that he was the identical person who had purchased the goods, to whom plaintiffs intended they should be delivered. The mere act of Anderson in taking possession of the goods was not *per se* wrongful, nor did the fraud of which he was guilty consist of that act. The fraud was in his falsely assuming a name other than his true one. The plaintiffs, having voluntarily delivered the goods to Anderson, thus enabling him to commit a fraud by their sale to the other defendants, must rather suffer than those who purchased the goods from him in good faith. They, therefore, cannot recover in this action.

III. The plaintiffs offered to introduce testimony by depositions tending to show that Anderson, through fraudulent representations as to his property, had, about the time of the sale by plaintiffs, obtained credit of other persons. The evidence was rejected, which is made a ground of complaint. If we should concede that the evidence is competent, its rejection was without prejudice to plaintiffs, in the view we take of the case, which is to the effect that, if it be conceded that the sale was induced by fraud, yet, as the goods were delivered by plaintiffs under it, they cannot recover against defendants, who are good-faith purchasers from Anderson. As the fraud is conceded, in this view of the case, the decision in the court below would not have been different had the evidence been received and weighed by the court. Its exclusion, therefore, was without prejudice to plaintiffs.

The foregoing discussion disposes of all questions in the case argued by counsel. The judgment of the district court must, therefore, be

AFFIRMED.

2. EVIDENCE:
exclusion of:
error without
prejudice.

KILLIAN V. GREENE.

1. **Conveyance: MISTAKE: CONFLICTING CLAIMS: EVIDENCE.** Plaintiff's record title to the land in question, being founded upon a mistake in the description of the land intended to be conveyed, was set aside, and defendant's title quieted, by the decree of the circuit court; and, upon consideration of the evidence, (see opinion,) the decree is affirmed.

Appeal from Jones Circuit Court.

THURSDAY, DECEMBER 11.

THIS is an action in equity by which plaintiff, who claims to be the owner of a small fractional piece of land, seeks to quiet her title as against the defendant. The defendant, by a cross-petition, claims that he is the owner of the land, and he prays that his title thereto may be quieted as against the plaintiff. There was a decree for the defendant, and plaintiff appeals.

Ezra Keeler, for appellant.

Remley & Ercanbrack and *Sheean & McCarn*, for appellee.

ROTHROCK, CH. J.—The land in controversy is a small tract, triangular in shape, and lying along the right of way of the Chicago, Milwaukee & St. Paul Railroad, and near the Wapsipinicon river. It is part of lot 6, in section 6, in a certain township, which lot was conveyed by the United States to Burton Peet by a patent dated in January, 1847. Conveyances were made from the patentee, and from several intervening grantors, down to the plaintiff, who acquired title to about seven acres of the lot in April, 1875. On the face of the records, the plaintiff appears to be the owner of the land in controversy. But the evidence shows that one Hickey, who was one of the intermediate grantors, was in possession of part of lot 6 as early as the year 1870, claiming that the land he had inclosed was that owned by him.

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Kilian v. Greene.

The land thus inclosed did not embrace that now in controversy. The plaintiff purchased of Hickey in 1875, and took possession of the same land that Hickey had inclosed.

We think it is very clearly shown that there was a mistake in the deeds conveying the land, and that this mistake runs back to a deed made by one Vernon to Engle, in the year 1858. The mistake consists in making the first call in the description at the northwest corner of the lot, when it should be at the center of the section. It is made quite certain that this is a mistake by the acts of the successive owners, in taking possession of about the proper quantity, the description of which commences at the center of the section, and by the controlling fact that, after the seven-acre tract was sold and conveyed, one of the owners of the residue conveyed part of the lot to another party, which, if the plaintiff's claim be well founded, had already been conveyed by the description under which plaintiff claims. Another controlling fact is that, when plaintiff made the purchase, she was a non-resident of the state, and the defendant made the purchase for her as her agent. He had a survey made, commencing at the center of the section, and he supposed that he was buying for the plaintiff the land that was enclosed by Hickey, plaintiff's grantor. It would be a very difficult undertaking to set out all of the conveyances, and show by the calls in the descriptions and other evidence in the case which of these parties is in the right, so that the general reader could understand the opinion. It is sufficient to say, however, that we are quite well satisfied that the decree of the circuit court is correct.

AFFIRMED.

GOODHUE, ADM'R, v. TEETSHORN, ADM'R.

1. **Mortgage Foreclosure: USURY: EVIDENCE.** Upon consideration of the evidence in this case, *held* that the defense of usury was established, and the decree of the district court to that effect is affirmed.

Appeal from Winneshiek District Court.

THURSDAY, DECEMBER 11.

ACTION TO FORECLOSE A MORTGAGE. Defense, usury. Trial to the court and judgment for the defendant. Plaintiff appeals.

Baker Bros., for appellant.

No appearance for appellee.

SEEVERS, J.—The defendant claims that C. H. Teetshorn, deceased, borrowed money of Lyman Goodhue in 1870, and that he has paid more than the amount due, if the transaction was tainted with usury. M. R. Farnsworth testified that he was acquainted with the parties, and that he made the loan in question as the agent of Goodhue. "The contract was, I was to furnish Teetshorn with a certain amount of money, and take his notes for \$1,200. The amount of money was \$1,200, less ten per cent. It was Lyman Goodhue's money, and the notes and mortgage were made payable to him. The notes were taken for \$1,200, payable in three and five years, drawing ten per cent semi-annual interest. I furnished the money for Lyman Goodhue, as his agent, through the bank of Kimball & Farnsworth. They were to deliver to Teetshorn \$1,080, and take his notes for \$1,200, drawing ten per cent semi-annual interest. I can't say when the money was paid to Teetshorn, but think it was about July 25, 1870, by the bank, by my written order; it was a certificate of deposit in my name, indorsed by me. Teetshorn did not get any other considera-

Goodhue, Adm'r, v. Teetshorn, Adm'r.

tion through me, and I know of no other." This evidence clearly shows that Teetshorn received \$1,080, and gave his notes for \$1,200, drawing ten per cent interest. That such a transaction is usurious there cannot be any controversy. But it is said that it does not appear that Teetshorn did not get more than \$1,080. The contract, however, was that he should only receive that amount, and he was given a certificate of deposit for such amount by the agent who made the contract for Goodhue. We think the only inference which can be drawn from the evidence is that Teetshorn only received \$1,080.

The foregoing evidence is strengthened by that of Teetshorn, whose deposition was taken prior to his death. But it is insisted that such evidence is inadmissible, because the evidence related to personal transactions with the deceased, Lyman Goodhue. This point is well taken as to such transactions, but the witness also testified to transactions with Goodhue's agent, in the absence of the latter; such evidence we think admissible. It is insisted that the evidence of Farnsworth is not worthy of belief; that he was so contradicted as to render his evidence unworthy of credit. We are unable to so conclude. The court rendered a judgment against the defendant, and in favor of the state for the use of the school-fund, for a certain amount. Counsel for the plaintiff insist that the state was entitled to a larger amount. We do not think there is any reasonable ground of complaint in this respect.

AFFIRMED.

Plummer v. The People's National Bank et al.

PLUMMER V. THE PEOPLE'S NATIONAL BANK, DEFENDANT, AND
HOLMES, INTERVENOR.65 405
101 724

1. **Fraud: INNOCENT PARTIES: WHO TO BEAR LOSS.** One who places it within the power of another to commit a fraud must bear the loss, rather than an innocent third party. So where a wife indorsed a paper in blank and gave it to her husband to enable him to effect a certain purpose, but he fraudulently pledged the paper to an innocent third party to secure a loan, *held* that she could not recover the paper from such party.

Appeal from Buchanan District Court.

THURSDAY, DECEMBER 11.

ACTION to recover possession of a life insurance policy. The defendant bank disclaimed any interest in the policy, and the intervenor claimed that he was entitled thereto. Trial by jury. The court directed the jury to find for the plaintiff, which they did, and the intervenor appeals.

Woodward & Cook, for appellant.

No appearance for appellee.

SEEVERS, J.—I. The life insured was that of John W. Plummer, the husband of the plaintiff. By the terms of the policy, the insurance was payable to the plaintiff, but if she should die before her husband, then the insurance was payable to their children. John W. Plummer is still living. The intervenor was in possession of the policy, and sent it to the bank. Prior to that time the plaintiff had possession of the policy, and she claims that the intervenor wrongfully obtained possession, with knowledge that it belonged to her. The evidence tended to show the following facts: "That the plaintiff, at the request of her husband, sent him the policy, with a blank indorsement thereon; that is, a blank was left for the insertion of the name of the assignee. The plaintiff's

husband borrowed money of Watson S. Hinkley, and filled the blank in the assignment with his name, and gave him the policy as security for the money borrowed." Such disposition of the policy was not contemplated by the plaintiff at the time she sent it to her husband. It is sufficient to say that the evidence tended to show that the plaintiff's husband perpetrated a gross fraud on her when he transferred the policy as he did, but there is no evidence tending to show that Hinkley or the intervenor had any knowledge of such fraud, unless the circumstances were such that he should be charged with the notice that the plaintiff had no authority to pledge the policy as he did.

II. To enable her husband to effectuate an object of which she was informed, the plaintiff assigned the policy in the blank. He was authorized to use the policy for such purpose, and to so fill the blank as to accomplish that purpose. This was the extent of the power conferred on him, and the question now is, which of two innocent parties must suffer the loss? We think the plaintiff, because she placed it in the power of her husband to commit the fraud. *McNeil v. Tenth Nat. Bank*, 46 N. Y., 325; *McDonald v. Muscatine Nat. Bank*, 27 Iowa, 319. We must not be understood as determining that the plaintiff indorsed the policy in blank. This question should have been submitted to the jury, and also the further question whether Hinkley or the intervenor, under the circumstances, should be charged with notice of the plaintiff's rights.

REVERSED.

BENN V. NULL.

1. **Master and Servant: INJURY BY NEGLIGENCE OF FELLOW SERVANT:**
LIABILITY OF MASTER: EVIDENCE. Plaintiff, a carpenter, sued defendant, a contractor and his employer, on account of an injury received by falling from a defective scaffold; but, it appearing that the scaffold was erected by a fellow servant, the defendant not being present, and there being no evidence that defendant was negligent in the employment of unskillful workmen, or in failing to furnish suitable materials with which to erect the scaffold, *held* that no recovery could be had, and that the trial court properly directed a verdict for defendant.

Appeal from Linn District Court.

THURSDAY, DECEMBER 11.

The plaintiff is a house-carpenter, and the defendant is a carpenter, contractor and builder. In 1883 the plaintiff was in the employ of the defendant, working by the day, and engaged with other employes of defendant in building a one-story house for one Brown. While plaintiff was standing upon a scaffold engaged at work, the scaffold gave way, and plaintiff fell a distance of about five feet to the ground, and was injured. He brought this action to recover damages of the defendant for the injury. There was a trial by jury, and a verdict and judgment for the defendant. Plaintiff appeals.

George W. Wilson and J. B. Young, for appellant.

Mills & Keeler, for appellee.

ROTHROCK, CH. J.—After the introduction of the evidence, the court directed the jury to return a verdict for the defendant; and the question presented is whether there was any evidence in the case which would warrant a jury in finding the defendant liable for the injury. The evidence shows that the defendant contracted with Brown to furnish all labor and materials for the construction of the house. Brown was a carpenter in defendant's employ. The defendant furnished

65	407
92	342
65	407
93	59
65	407
100	211
100	448
65	407
110	240
65	407
127	006
65	407
136	438
65	407
137	451

Benn v. Null.

suitable and sufficient materials for the erection of the house, and intrusted the supervision of the whole work to Brown, who remained in his employ, working by the day with other employes of defendant. Defendant had other contracts, and was absent most of the time. Without any direction from Null, and in his absence, and without his knowledge, Brown and another employe selected the materials, and built the scaffold in question. There was suitable material on the ground for the scaffold, and no complaint is made of the materials used, and the evidence shows, without conflict, that Null is not chargeable with negligence in employing unskillful mechanics to work upon the building. The plaintiff was employed by Null, and sent to the building to work, and the scaffold fell, and he was injured on the second day after he commenced to work. It is very plain that the plaintiff is seeking to recover of his employer for an injury received by reason of the negligence of a co-employee. This he cannot do. If Null was not chargeable with negligence in the employment of unskillful workmen, or in failing to furnish suitable materials with which to erect the scaffold, he is not liable. There is no evidence of such negligence, but, on the contrary, it is shown beyond question that he was not negligent in these respects.

The circuit court did not err in directing a verdict for the defendant. Wood, Mast. & Serv., §§ 410, 411, 437, 452.

AFFIRMED.

PRESTON V. HALE ET AL.

1. **Appeal to Supreme Court: TRIAL DE NOVO: RECORD AS TO EVIDENCE.** A trial *de novo* cannot be had in this court unless the evidence is certified within the time allowed for an appeal, (Laws of 1882, Ch. 35,) in the absence of an agreement that the abstract contains all the evidence.
2. ———: **AGREEMENT AS TO ABSTRACT: EVIDENCE TO ESTABLISH.** This court is precluded by statute (Code, § 213) from finding from affidavits alone that counsel for appellee agreed to appellant's abstract of the evidence.

Appeal from Buchanan Circuit Court.

THURSDAY, DECEMBER 11.

ACTION to set aside a probate sale of real estate. There was a decree for the plaintiff. The defendants appeal.

Woodward & Cook, for appellants. ●

E. E. Hasner, for appellee.

ADAMS, J.—The appellants have taken this appeal for the purpose of securing a trial *de novo*. Their abstract purports to contain all the evidence introduced or offered, and is sufficient in that respect. It does not expressly show that the evidence was made of record, but our practice is to assume that it is so claimed, and that the claim is well founded, in the absence of any showing to the contrary. The appellee, however, has filed an additional abstract, as an amendment to the appellant's abstract, in which he denies that the evidence was made of record, and it seems to be undisputed that such was the fact at the time the additional abstract was filed. Afterwards the appellants, as we infer, procured the evidence to be certified, but not until the period of six months had elapsed which was allowed for an appeal. The statute provides that the evidence in an equitable action shall be certified

by the judge within the time allowed for an appeal. Acts of the Nineteenth General Assembly, chapter 35. (McClain's Supp., § 2742, p. 185.)

The appellants file affidavits tending to show that the appellee agreed to an abstract of the evidence, and virtually agreed to waive the certification of the evidence; and, while this is denied by the appellee, we are inclined to think that according to a preponderance of the evidence such is the fact. We are precluded, however, by statute from finding such fact upon affidavits as the only evidence. Code, § 213. In this condition of the record we are unable to reach the merits of the case; and the decree must stand.

AFFIRMED

WILLIAMS ET AL. V. POOR ET AL.

1. **Township: DIVISION OF: WHEN COMPLETED FOR PURPOSES OF ELECTIONS: TAX IN AID OF RAILROAD.** In § 384 of the Code, relating to the division of a township containing a city or incorporated town, the words "for election purposes" refer only to the election of officers for the new township; and, as the old township organization in such a case continues to exist until the first day of January following the order of the supervisors for the division of the township, all other elections to be held before the first day of January must be by the original township as it was before the division. So *held* in this case, where a tax in aid of a railroad was voted by the whole original township in December, prior to the January when the division of the township, previously ordered, took effect under the statute.
2. **Tax in aid of Railroad: FIVE PER CENT LIMIT: SECOND TAX WHEN FIRST ABANDONED: STATUTE CONSTRUED.** Where in 1877 a certain township voted a five per cent tax in aid of a certain railroad, which was duly levied by the supervisors, and entered on the tax books, and in December, 1878, the electors of the township voted another five per cent tax in aid of another railroad, and in May, 1879, the directors of the first railroad company rescinded and abandoned the tax voted in its favor, and in June following the supervisors canceled said tax, and in September following levied the tax in aid of the second railroad, *held* that the second tax was not void as being in violation of the provision of the statute (Sec. 3, chapter 123, Laws of 1876,) to the effect that the

65	410
393	779
65	410
119	410
65	410
121	836
65	410
132	508

Williams et al. v. Poor et al.

aggregate of such tax "to be voted or levied" should not exceed five per cent of the assessed value of the property of the township; because, construing the statute with reference to its purpose, the word "or" in the quoted clause should be construed as *and*, and before the second tax was voted *and* levied, the first levy had been set aside.

ADAMS, J., *dissenting*.

Appeal from Ringgold Circuit Court.

FRIDAY, DECEMBER 12.

ACTION in equity to restrain the collection of a tax voted and levied in aid of the construction of the Leon, Mt. Ayr & Southwestern railroad. Trial to the court, and judgment restraining the collection of the tax. The defendants appeal.

Laughlin & Campbell and *W. W. Baldwin*, for appellants.

Nourse & Kauffman, for appellees.

SKEEVERS, J.—I. The validity of the tax in question is assailed on two grounds. The first to which we turn our attention is based on the following facts: In 1878, Mt. Ayr township embraced the incorporated town of Mt. Ayr, and certain other territory. In April of that year, the board of supervisors, in pursuance of law, divided said township, so that the territory outside of the town should constitute a separate township, to be known as Poe township. At the general election in October following, officers were duly elected for the township of Poe. The petition for the tax in question was presented to the trustees of Mt. Ayr township in November, 1878. The election was held in December, at the court-house in the township of Mt. Ayr, and the tax was then voted. No election was ordered or held within the territory constituting the township of Poe. Some of the plaintiffs are residents of and tax-payers in the last-named township, and it is insisted that they cannot be compelled to

1. TOWNSHIP:
division of:
when completed for
purposes of
elections:
tax in aid of
railroad.

pay the tax, because no sufficient notice of an election was given, and no election held in the township of Poe. The solution of this question depends on the fact whether, at the time the notice was given and the election held, there was in existence any such organization as the township of Poe. The statute provides that, upon the presentation of the proper petition, the board of supervisors shall divide the township into two townships, "but, except for election purposes, including the appointment of all judges and clerks of election rendered necessary by the change, such division shall not take effect until the first of January ensuing." Code, § 384. Under a similar state of facts, it was held in *Lamb v. Burlington, C. R. & M. R. Co.*, 39 Iowa, 333, that the organization of the new township could not be regarded as complete until the first day of January following the election of the township officers. But it is urged that in that case the meaning of the words "for election purposes" was not determined; and it is insisted that any special election which affects the residents or the tax-payers must be held in the new township.

Section 791 of the Code provides that "the provisions relating to general elections shall govern special elections, except where otherwise provided by law." The election at which the tax was voted was a special election, and, as the general election for the election of officers must be held in the new township, it is insisted that the special election must also be held there. But the statute under which the special election was held provides that the notice therefor "shall specify the time and place" at which it shall be held. It may, therefore, be held at a place other than where the general election is held, unless such place is manifestly unsuitable. Besides this, the words "for election purposes," in section 384, must, we think, be construed to refer alone to the first election of officers in the new township, as defined in the five sections of the Code following section 384. There is no provision of the statute which authorizes or contemplates any election in the new

township, except that for the election of officers, prior to January following such election. As the old township organization continues to exist, all special elections contemplated or authorized by law to be held prior to the contemplated organization of the new, must be held in the old or original township.

II. The second ground upon which it is claimed the tax is illegal is, that the power conferred upon the electors of the township to vote the tax was exhausted when the election was held. The facts are that in 1877 a tax of five per cent was voted upon the taxable property of the township, in aid of the construction of the St. Joseph, Osceola & Des Moines Narrow Gauge railroad, which had been duly levied by the board of supervisors, and entered on the treasurer's books for collection, and the same had not been set aside or annulled on the twenty-eighth day of December, 1878, when the tax in controversy was voted by the electors. In May, 1879, the board of directors of the St. Joseph, Osceola & Des Moines Narrow Gauge Railroad Company passed a resolution rescinding and abandonig the tax voted in aid of said road, and in June following the board of supervisors canceled the tax in pursuance of the said action of the board of directors. Afterwards, in September, 1879, the tax in controversy was levied by the board of supervisors, and shortly thereafter the same was entered on the books of the treasurer for collection. It appears, therefore, that, at the time the tax in question was *voted*, a prior tax of five per cent had been voted by the electors and levied by the board of supervisors, and that the same had not been set aside or abandoned; but that, prior to the *levy* of the tax in question, the prior tax had been set aside, abandoned, and canceled. The tax was voted under the authority conferred by chapter 123 of the Acts of the Sixteenth General Assembly, (McClain's Code, 369,) and it is therein provided that "the aggregate amount of tax to be voted or levied under the provisions of this act in any township * * *

2. TAX in aid
of railroad:
five per cent
limit: second
tax when first
abandoned:
statute con-
strued.

shall not exceed five per centum of the assessed value of the property therein."

The question is fairly presented whether the power to vote a tax has been exhausted when a prior tax, which has been voted and levied, has not been abandoned or canceled; or whether the power is not exhausted until the tax has been levied and becomes a legal charge. In other words, the real question is one of power, and is that exhausted by the vote of the electors? It is said by counsel that the circuit court held that the power was exhausted by the vote, and based the ruling on *Dumphy v. Supervisors of Humboldt Co.*, 58 Iowa, 273. But that case simply holds that, when a tax of five per cent "has been voted, levied and collected," the power is exhausted; and it was said by BECK, J., in that case, that the conclusions reached "are not to be understood as applicable to cases wherein taxes have been voted and levied and afterwards for any cause are abandoned, or cannot be collected." The cited case cannot, therefore, be regarded as decisive of the question to be determined in the present case.

In the construction of a statute, the object, purpose and intent must be considered, and particular words used should be construed with reference to the purpose in view in enacting the statute. The real intent of a statute, if it can with reasonable certainty be ascertained, will prevail over the literal sense of the words employed. *District Township v. Dubuque*, 7 Iowa, 262; *Tully v. Beaubien*, 10 Id., 187; *Dilger v. Palmer*, 60 Id., 117. The primary object of the statute under consideration was to enable the people of a city or township, by the imposition of a tax on their property, to so materially contribute to the construction of a railroad that the same would be, within a time fixed by the electors, completed and operated to some point so near such township or city as to, in the judgment of the electors, be beneficial to them. To merely vote a tax, or to vote that a certain amount should be raised by taxation, would never accomplish such a result. While, under the statute, it is essential that the tax

should be voted, this alone does not create a tax. Before there can be, in any just sense, a tax, there must be a levy. The statute under consideration provides that the board of supervisors shall "levy such taxes as are voted." When this is done, and not until then, is there a charge on the property of any individual. The levy is just as essential to the validity of the tax as the vote. In fact, if there was no levy by the proper authority, the tax and all proceedings based thereon would be invalid and absolutely void. *McCready v. Sexton*, 29 Iowa, 356; *Early v. Whittingham*, 43 Id., 162. Until the levy, it cannot be said that there was a tax in existence; yet the statute speaks of voting a tax. The latter word is used simply as a convenient name given the subject-matter, to be brought into existence by the statute or power conferred. The statute does not mean that the simple vote, without more, creates a tax. So, when the statute provides that the aggregate amount of tax *to be voted or levied* shall not exceed five per cent, it simply means that the amount which may be contributed to the designated purpose shall not exceed the amount named.

The statute should be construed as if written thus: The aggregate amount of tax "to be voted *and* levied" shall not exceed five per cent. In the construction of statutes, the words "and" and "or" are convertible, as the sense may require, even in a criminal statute, where a strict construction usually prevails. *State v. Myers*, 10 Iowa, 448; *State v. Brandt*, 41 Id., 593. In *Boyles v. McMurphy*, 55 Ill., 236, "or" was construed as "and." In favor of this construction several reasons may be given: (1) Because, as has been shown, there cannot be any aggregate amount of taxes until the essential requisites of the power of taxation have been executed. (2) If the vote exhausts the power, then the spirit, meaning and intent of the statute will be nullified; because it must follow, if the statute is literally construed, that the electors can vote but one five per cent tax, although the road in aid of which the tax was voted is never constructed, and

has been wholly abandoned. And (3) if the vote exhausts the power, then it matters not if the election was illegally held, and the tax voted absolutely void. If the power is exhausted by the vote, then the electors must know before the election that, if aid is voted, the road will certainly be constructed. This never can be known with certainty; and it is well known that many railroads, when prospected, were experiments, but are now prosperous corporations. Many other prospected enterprises have failed to be constructed, and it is probable that such will be the case in the future. The electors can readily protect themselves by providing that no part of the tax shall become due and payable until the road is completed. They then get that for which they contracted. This was done in this case. The road was constructed, and the plaintiffs had knowledge that this was being done on the faith that the tax voted by them would be paid; but they took no steps to have the tax declared illegal until after the road was constructed, and they were daily receiving the advantages which constituted the inducement to them in voting the tax. Cogent, equitable reasons, therefore, impel us to say that we are not disposed to be astute in finding a technicality upon which to base the deduction that the tax in question is not collectible.

When the tax in question was levied, no other tax in aid of a railroad was in existence. Therefore, the aggregate of taxes never exceeded five per cent, and we are content to rest our conclusion on the construction of the statute which we have adopted.

REVERSED.

ADAMS, J., *dissenting*. Where a tax of five per cent has been voted and levied, as in this case, I do not think that the electors of the township have power to vote an additional tax until the former levy has been set aside, or the tax, for some reason, has become uncollectible. The majority seems to treat the vote in question as a provisional vote; that is, a

Malone v. The Burlington, Cedar Rapids & Northern R'y Co.

vote that was to become binding if the former valid tax should be set aside. But I know of no law by which the electors can properly be called upon to vote provisionally. If this can be done once, it can be done any number of times. I think that the election was irregular, and cannot, for that reason, be deemed a fair exposition of the will of the electors.

MALONE V. THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY.

1. **Railroads: INJURY TO EMPLOYEE BY CO-EMPLOYEE: NEGLIGENCE: LIABILITY: STATUTE APPLIED.** An employe of a railroad company whose duty it is to wipe engines, open and close the doors of an engine house, and remove snow from a turn-table and connecting tracks, is not, by reason of such duties, in any proper sense employed in the operation of the railroad, within the meaning of section 1307 of the Code; and for an injury received, while performing such duties, through the negligence of a co-employe, he cannot recover against the company, under the provisions of said section, notwithstanding he may have other duties to perform which do pertain to the operation of the road. *Deppe v. C., R. I. & P. R'y Co.*, 36 Iowa, 52, distinguished, as having been decided under a different statute.

Appeal from Linn District Court.

FRIDAY, DECEMBER 12.

THIS is an action for the recovery of damages caused by a personal injury sustained by plaintiff while in the employ of defendant; the injury being caused by the negligence of a co-employe. The verdict and judgment were for defendant, and plaintiff appeals.

Blake & Hormel, for appellant.

Samuel K. Tracy, for appellee.

REED, J.—It was proven on the trial that, at the time he
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65	417
78	585
78	586
65	417
87	213
65	417
92	229
65	417
106	57
65	417
128	212
65	417
130	584
130	585
130	585
65	417
1131	335

received the injury complained of, plaintiff was, and for some years had been, in defendant's employ as a wiper; that his duties were to clean the engines when they were brought in off the road, to open the doors of the engine-house to admit the passage of engines into and out of the house, and close the same after the engines had passed; to turn the turn-table; to shovel the snow from the turn-table and tracks leading to the engine-house into a dumpy or hand car, and move the same to some convenient and accessible place on the main track over which the trains passed, and there shovel the snow from the dumpy; that on the night of the accident plaintiff and a foreman and another wiper went to the doors of the engine-house for the purpose of opening them to admit the passage of an engine which had just come in.

There are two doors at the entrance of the engine-house, which, when being opened, swing outward from the center of the entrance. The parties had difficulty in opening them on the occasion in question, owing to an accumulation of ice on the ground immediately outside of the door; and they took picks and removed a portion of the ice, when they were enabled to open them without accident, and the engine passed in. They then attempted to close the doors. Plaintiff took hold of one door, and closed it without difficulty; but the other parties had difficulty in closing the other, and the other wiper placed a crowbar under it, for the purpose of raising it to enable it to pass over the ice. In doing this he lifted it off the hinges, and it fell upon plaintiff, inflicting the injuries complained of. At the time the door fell upon him, plaintiff was standing on the track leading into the engine-house, it being his duty to remain there and assist in closing the door; and he was not guilty of any negligence which in any manner contributed to the injury. As there was no conflict in the evidence as to the character of the duties which devolved upon plaintiff by virtue of his employment, or as to the circumstances under which the injuries were received, the court

ruled, as matter of law, that he could not recover, and directed the jury to find for defendant.

The case has once before been in this court. 61 Iowa, 326. On the former trial the district court instructed the jury that, if plaintiff's duty was to open and close the doors to the engine-house, and while he was in the performance of that duty he was injured by one of the doors falling upon him, and this was occasioned by the negligent act of a co-employee in lifting said door from its hinges, he was entitled to recover. But it was held by this court that this instruction was erroneous, and the judgment was reversed. In addition to the facts established on the first trial, it was proved on the second trial that plaintiff was required, when opening or closing the doors of the engine-house, to stand on the track leading into the building. Also, that it was his duty to turn the turn-table, and remove the snow from the turn-table and tracks leading into the engine-house. It is now contended by counsel for plaintiff—*First*, that our holding on the former appeal is not necessarily conclusive of plaintiff's right to recover on the facts as proved on that trial; or, if this is not so, *Second*, that the facts proved on the second trial distinguish the case from that made on the former trial, and bring it within the provision of section 1307 of the Code. The instruction given on the former trial held that, if plaintiff was injured while in the performance of his duty of opening or closing the doors, and the injury was caused by the negligence of a co-employee in lifting the door from its hinges, he was entitled to recover. This was held erroneous on the grounds (1) that the particular duty in which he and his co-employee, whose negligence caused the injury, were engaged at the time of the accident did not pertain to the business of *operating* the railroad; and (2) neither that particular duty, nor any other which the nature of his employment required him to perform, as shown by the evidence, brought him within the class of employees who are engaged in the business of operating the railroad. The con-

struction which has been put by the adjudications of this court upon the statute under which the liability of railroad companies to employes for injuries caused by the negligence of co-employes arises, is that it affords a remedy only to such employes as are employed at the time of receiving the injury in the business of operating the railroad; (*Deppe v. Chicago, R. I. & P. R. Co.*, 36 Iowa, 52; *Schröder v. Same*, 41 Id., 344; *Smith v. Burlington, C. R. & N. R. Co.*, 59 Id., 73; *Foley v. Chicago, R. I. & P. R. Co.*, 64 Id., 664;) and the holding that the facts proved showed that plaintiff was not so engaged at the time of the injury necessarily concludes all right of recovery upon those facts.

We come, then, to the question whether the facts proved on this trial bring the case within the statute, and we think it clear that neither the wiping of the engines, nor the opening and closing of the doors of the engine-house, nor the removing of the snow from the turn-table and tracks, in any proper sense pertain to the operation of the road. The only duty which plaintiff was required by his employment to perform, which it can be claimed at all pertains to the operation of the railroad, was that of turning the turn-table. As we understand it, this table is a circular platform, so constructed and supported that it may be turned upon its center. There is a track leading to it from the main track of the road, and from it other tracks radiate as from a center, leading into the different stalls in the engine-house, and there are rails upon it. When an engine is to be run from the main track into the house, the table is so adjusted as to connect the rails on the table with the track leading from the main track. The engine is then run upon the table, which is then turned until connection is made between the rails on it and one of the tracks leading into the engine-house, when the engine is run into the building; and engines are taken from the engine-house to the main track in the same manner.

Plaintiff's duty was to turn the table and make these adjustments at times when engines were being run between

the main track and engine-house. His duty in that regard was somewhat similar to that performed by a switchman in adjusting the switches to permit the passage of trains from the main line to the side tracks, and we think it may be said that in performing this duty he was engaged in the operation of the road, just as the switchman is engaged in its operation when he adjusts the switch. Each, in the performance of the duty assigned him, does an act which is necessary to be done in the use and operation of the road, and if either should be injured while in the performance of the duty, in consequence of the neglect or mismanagement or willful wrong of a co-employee who, at the time, was also engaged in the operation of the road, he would probably have a remedy therefor, under the statute against the company. But plaintiff did not receive the injury of which he complains while in the performance of that duty, but it was inflicted while he was in the performance of another duty, which, as we think, was in no manner connected with the operation of the road. It is insisted, however, that his employment was entire, and, as part of his service related to the business of operating the road, he has his remedy under the statute, even though the injury was not sustained while in the performance of that particular part of the service. The case of *Deppé v. Chicago, R. I. & P. R. Co.*, *supra*, is relied on as sustaining this view, and it must be admitted that some things are said in the opinion in that case which seem to favor this claim.

But we think the question is materially affected by an amendment of the statute which has been enacted since that decision. That case was decided under section 7, chapter 169, Acts 1862, which is as follows: "Every railroad company shall be liable for all damages sustained by any person, including employes of the company, in consequence of any neglect of the agents, or by any mismanagement of the engineers or other employes of the corporation, to any person sustaining such damage." The present statute is section 1307 of the Code, which is as follows: "Every corporation

operating a railroad shall be liable for all damages sustained by any person, including employes of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employes of the corporation, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers or other employes, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed." And this statute was in force at the time plaintiff received the injuries in question. In construing this section in *Foley v. Chicago, R. I. & P. R. Co.*, *supra*, we held that the term "such wrongs," in the latter clause of the section, did not relate alone to the willful wrongs spoken of in the preceding clause, but that it related as well to the mismanagement and negligence spoken of in the former part of the section. Under this construction, it is apparent that the last clause of the section creates a limitation as to the class of acts for which the company is liable, which did not exist under the former statute. The liability created by the act of 1862 is expressed in general terms. By it the company is made liable for all damages sustained by any person in consequence of any mismanagement or neglect of its employes. The acts or omissions of its employes for which it would be liable would be such, of course, as the employes should commit in the course of their employment; but its liability is not otherwise limited by the act; while, under the present statute, its liability is limited to such damages as are occasioned by the negligence or mismanagement or willful wrongs of its employes, which are connected with the use and operation of the railroad on or about which they are employed.

To meet the objection that the act of 1862 created a rule of liability which was applicable to railroad companies alone, and did not affect other employes under precisely the same circumstances, and that it was, therefore, class legislation, and in violation of the state constitution, the court in *Deppes*'s

Myers v. Munson.

Case construed the act as creating a remedy only in favor of that class of employes who were engaged in the hazardous business of operating railroads, and the correctness of the holding of that case on that question is not doubted. But the subsequent legislation has established a new rule as to the class of acts for which the companies are liable. So that, to entitle an employe now to recover against the company for injuries which he has sustained in consequence of the negligence or mismanagement or willfulness of a co-employe, he must show (1) that he belonged to the class of employes to whom the statute affords a remedy; and (2) that the act which occasioned the injury was of the class of acts for which a remedy is given. We think it very clear that the plaintiff has failed to establish the latter fact.

The district court, therefore, rightly directed the jury to find for defendant.

AFFIRMED.

MYERS V. MUNSON.

66	423
94	120
94	227

- 1. Contract in Writing: TWO PAPERS CONSIDERED TOGETHER: PAROL TO VARY: RULE APPLIED.** The written agreement of the parties to a contract is conclusively presumed to be their final agreement, and any parol agreement inconsistent therewith to have been waived. *Barhydt v. Bonney*, 55, Iowa, 717. And so, where two papers are to be considered together as being parts of the same transaction, and as constituting together the agreement of the parties, they must speak for themselves, and the agreement which they together contain cannot be varied by proof of a contemporaneous parol agreement. Where, therefore, defendant conveyed to plaintiff, with covenant against incumbrances, property encumbered with a permanent easement, and plaintiff sued on the covenant for the breach thereof, and the answer set up another writing, as a part of the same transaction, but which contained no limitation of the covenant, and also set up a contemporaneous parol agreement that, in consideration of such writing, the easement was to be excepted from the covenant, *held* that the answer was bad on demurrer, because proof of the parol agreement could not be admitted.

Myers v. Munson.

- 2. Vendor and Vendee: BREACH OF COVENANT: DAMAGES: EVIDENCE: FORMER JUDGMENT.** Where defendant conveyed to plaintiff, with a covenant against incumbrances, property encumbered with a perpetual easement, and plaintiff sold to another, with like covenant, and that other sued plaintiff for a breach of his covenant, and recovered judgment for \$500, and plaintiff, in this action, sued defendant on his covenant for a like breach, *held* that the record of the judgment was not admissible in evidence for the purpose of proving the amount of damages to which plaintiff was entitled; because the breach in each case was contemporaneous with the covenant, and the covenants were of different dates, and the damages in each case had to be computed with reference to the time of the breach, and the market value of the property at that time.
- 3. ———: ———: ———: ATTORNEY'S FEES.** In such case, plaintiff was not entitled to recover what he had paid for attorney's fees in defending against the action brought against him for a breach of his covenant, notwithstanding he had notified defendant of the first action, and requested him to defend therein, and he failed so to do.

Appeal from Buchanan Circuit Court.

FRIDAY, DECEMBER 12.

ACTION for the breach of a covenant of warranty in a deed. There was a trial to the court, and judgment was rendered for the plaintiff. The defendant appeals.

Lake & Harmon and C. E. Ransier, for appellant.

E. E. Hasner, for appellee.

ADAMS, J.—The premises in question consisted of improved property in the city of Independence. They were sold and conveyed by the defendant to the plaintiff by deed with full covenants, and afterwards they were sold and conveyed by like deed by the plaintiff to one McGowen. At the time of the conveyances there was a perpetual easement existing upon the property in favor of the lot adjacent thereto on the east, to-wit, the right on the part of the owner of such lot to the use and maintenance of a stair-way, hall-way, etc. McGowen, in an action against the present plaintiff for breach of covenant, recovered \$500, which the plaintiff has

paid. The present defendant was notified of the action, and requested to defend. The present action was brought to recover the sum of \$500 and interest, and the costs and expenses incurred and paid by this plaintiff in the action brought against him by McGowen.

I. The conveyance to the defendant was made by one Hageman, the owner of the lot adjacent on the east. The easement was created by reservation in the deed from Hageman to the defendant. At the time of the execution of the deed, the parties entered into a contract whereby Hageman agreed to be at one-half the expense of erecting the stairs and keeping them in repair. When the defendant conveyed to the plaintiff, he assigned this contract to him, so as to give him the same rights, under the contract against Hageman, as he had himself possessed. Having thus put the plaintiff into a position to call upon Hageman to assist in maintaining the stairs, he seems to have conceived the idea that he might safely enough execute to him a deed with full covenants, and not incur any liability by reason of the stairway, hall-way, etc. Possibly there was a verbal understanding that the defendant should not incur such liability. At all events, he set up in his answer the assignment of the contract, and averred that the assignment was a part of the same transaction in which the deed was made, and that it was verbally agreed that the assignment should be a full settlement of any damages arising by reason of the covenant against the easement. He also averred, in substance, that it was verbally agreed that the easement, in consideration of the assignment, should be excepted from the covenant. The plaintiff demurred to so much of the answer as set up by these defenses, and the demurrer was sustained. The defendant assigns the ruling of the court upon the demurrer as error.

Where two papers are executed as parts of the same transaction, it may be conceded that they should be read together, and construed together, and it may be that, if, when taken

1. CONTRACT
in writing:
two papers
considered to-
gether: parol
to vary: rule
applied.

together, they do not show upon their face that they were parts of the same transaction, such fact may be shown by parol. But, when the two papers are thus connected, they must speak for themselves. It is not proper to go further, and contravene the papers by parol evidence, as the defendant would be obliged to do in order to make the defense upon which he relies. The deed contains an unlimited covenant against incumbrances, and there is nothing in the contract or assignment of the contract which tends to show otherwise. Reading the deed and assignment of the contract together as parts of the same transaction, the most that we could infer is that they were supported by the same consideration. The plaintiff would appear to be entitled to both papers, with all that they contain. The defendant is not aided, unless he can go much further than to connect the two papers. He needs to go outside of them and ingraft by parol an exception upon the covenant against incumbrances. This he cannot be allowed to do, nor can he be allowed to do what is substantially the same thing; and that is, to show that the damages arising from the breach of the covenant were settled and discharged by the assignment, if it be true, as averred that the assignment and deed were parts of the same transaction. Parties cannot be supposed to enter into a contract which gives an immediate right to damages, and in the same contract to settle and discharge the damages.

We do not forget that the question under consideration arose upon demurrer, and that all facts well pleaded are regarded as admitted. But the written agreement of the parties is conclusively presumed to be the final agreement, and any parol agreement inconsistent therewith to have been waived. *Barhydt v. Bonney*, 55 Iowa, 717. It may not be improper to add that we think that the defendant's position must have been taken somewhat with reference to the fact that the taking by the plaintiff of an assignment of the contract shows clearly that he had knowledge of the easement. We have no doubt that the defendant supposed that the

plaintiff acquiesced in the easement in such sense as to preclude him from setting it up as a breach of a covenant in the deed. It may be that decisions could be found to support the position that he was precluded by his knowledge and acquiescence. But we do not understand such position to be distinctly taken; and, besides, if it were, it would be against the decided weight of authority. See Rawle, Cov., 128, and cases cited. In our opinion the court did not err in sustaining the demurrer.

II. Upon the trial the plaintiff was allowed, against the objection of the defendant, to introduce in evidence the record of the judgment recovered against him by McGowen. As the defendant was notified of McGowen's action, we have no doubt that the recovery in the case concluded the defendant in regard to the existence of the easement. But the existence of the easement was not denied. The record, then, must have been introduced for the purpose of proving the amount of the plaintiff's damages. The plaintiff, indeed, insists that it was proper for that purpose. But, in our opinion, this position cannot be sustained. The plaintiff's damages might be greater or might be less than McGowen's, according to circumstances. There was no one element of damages precisely in common in the two cases. The plaintiff had a right of action before McGowen's action was brought. Where there is a covenant against incumbrances, as in this case, and a breach by reason of the existence of a permanent easement, the covenantee, immediately upon the breach, becomes entitled to receive from the covenantor such sum of money as would be to him a just compensation for the injury. *Harlow v. Thomas*, 15 Pick., 66. In determining the injury, it would be proper to consider how much the value of the property should be regarded as reduced by reason of the easement. In estimating the value, the general market value should be taken. *Wetherbee v. Bennett*, 2 Allen, 428. The estimate should be made as of the time of the breach. *Cathcart v.*

2. VENDOR
and vendee:
breach of
covenant:
damages: evi-
dence: former
judgment.

Bowman, 5 Pa. St., 317. To the amount of original damage sustained, something should be added for delay in payment. The amount to be added is the reasonable value of the use of the money, which, under our statute, is conclusively presumed to be six per cent per annum. The principle was decided in *Hartshorn v. Burlington, C. R. & N. Ry. Co.*, 52 Iowa, 617.

The rules above set forth, it appears to us, were applicable alike in McGowen's case and in the case at bar. If this is so, the same amount would not be recoverable in each case, except by accident. It is unnecessary to elaborate, but it may be proper to say that, in case of successive conveyances with a covenant against incumbrances, and a breach of covenant by reason of a permanent easement, it may easily happen that the second covenantee would be entitled to recover more than the first. This might be so if the property had become enhanced in value. The damages resulting from an easement, where property is taken for a stair-way or other way, are substantially in proportion to the value of the property thus occupied, and, where there are breaches of successive covenants, as above supposed, the damages, as we have seen, are to be estimated in each case with reference to the time of the particular breach in question. We are of the opinion, therefore, that the record of McGowen's judgment, not being needed as evidence to establish the fact of the easement, such fact being admitted in the answer, was not admissible for any purpose.

III. The court allowed a recovery for attorney's fees paid by the plaintiff in defending in McGowen's action. In this we
 3. —: —: think that the court erred. Where an action is
 —: attor- brought against a covenantee to recover possession,
 ney's fees. and judgment is rendered for the plaintiff, it may be that, in an action brought by the covenantee against his covenantor, he should be allowed to recover for attorney's fees expended in defending the former action, if the covenantor was notified of the action. We may say, however, that upon

such a question the authorities are divided, and we do not desire to intimate an opinion. If it should be conceded that attorney's fees in such case would be recoverable, the concession would not aid the plaintiff. His defense in respect to damages, as we have seen, had, properly considered, nothing in common with the defense in the case at bar. The expenses, then, which this plaintiff incurred in making his defense in that case ought not to be charged upon the defendant in this.

REVERSED.

THOMPSON V. LOCKE.

1. **Contract: RULE OF CONSTRUCTION: SITUATION AND ACTS OF PARTIES: RULE STATED AND APPLIED.** It is always competent, in construing a written contract, to consider the situation of the parties, the subject-matter of the contract, and the acts of the parties under the contract, as showing what the parties understood to be their obligations; and this is no infringement of the rule that the contract cannot be explained or varied by parol. And so, where plaintiff was employed by defendant to drive piles on a railroad between certain points, and plaintiff agreed "to push said driving so as to keep out of the way of the track-layers;" and "to drive on said line until all the piles are driven to " the terminus of the road, and the question arose whether plaintiff had, by virtue of said language in the contract, the *exclusive* right to drive piles on said line, and it was shown that, when he began work, another, to his knowledge, and without objection on his part, began like work at another point on the line, and continued such work over a large portion of the line, and that plaintiff, without objection, accepted help from such other person, on the part where he (plaintiff) was engaged, *held* that the contract, construed in the light of these circumstances as indicating the intention of the parties, did not give plaintiff the exclusive right to drive the piles on said line.

Appeal from Benton Circuit Court.

FRIDAY, DECEMBER 12.

THIS is an action at law, by which the plaintiff seeks to recover damages of the defendant for the breach of a written

65	429
79	248
65	429
88	174
65	429
90	384
65	429
93	117
65	429
104	422
65	429
1131	162
65	429
1133	77

Thompson v. Locke.

contract for the driving of piling on the line of the Burlington, Cedar Rapids & Northern Railroad from Clarion to Estherville. There was a trial by jury, and a verdict and judgment for the plaintiff for \$920. Defendant appeals.

Gilchrist & Haines, for appellant.

Nichols & Burnham, for appellee.

ROTHROCK, CH. J.—The following is a copy of the contract between the parties: “Articles of agreement made and entered into this seventh day of June, 1881, between James B. Locke, of the city of Vinton, Benton county, state of Iowa, of the first part, and J. C. Thompson, of the city of Vinton, Benton county, state of Iowa, of the second part, as follows: The party of the second part agrees to commence driving piles, as soon as notified that the piles are on the ground ready, at or near Clarion, on the line of the Burlington, Cedar Rapids & Northern Railroad; and further agrees to push said driving so as to keep out of the way of the track-layers, so that the track-layers will not have to wait for the piles to be driven; and further agrees to drive on said line until all the piles are driven to Estherville, that being the terminus of the road this coming fall; said driving of piles to be done subject to the approval and acceptance of the engineer in charge of said road. The party of the first part agrees to furnish transportation on the Burlington, Cedar Rapids & Northern road, free of charge, to the second party; also to furnish piling on the ground at or near where the piling are to be driven. The first party agrees to keep piling on hand, so that the second party will not have to wait for piling. The party of the first part agrees to pay the second party, upon the engineer's monthly estimate, the sum of seventeen and one-half cents per lineal foot of piles driven; also to pay over to said second party, upon completion of contract, all moneys due him for said piling.”

It is conceded that the plaintiff, as soon as notified, pro-

ceeded to the point designated, and entered upon the performance of the contract. He charges that the defendant failed and refused to furnish piling on the ground as he agreed to do, and refused to allow plaintiff to drive the piling when the same were on the ground, at or near the place where the same were to be driven. The defendant, in addition to a general denial, avers that he fully performed the contract on his part, except a delay on one occasion in furnishing piling as required by the contract, but that he settled with and fully paid the plaintiff for such delay; that about November 24, 1881, the contract was abrogated by mutual consent of the parties; and that in March, 1882, a full and complete settlement of all matters arising thereunder was had between the parties, and plaintiff was then paid in full all that was found to be due to him. The cause was tried upon the theory that by the contract the defendant was bound to allow the plaintiff to drive all the piling between the points therein named, and the court instructed the jury as follows: "*First.* Under the written contract between plaintiff and defendant, and upon which plaintiff brings this suit, you are instructed that plaintiff covenanted and agreed to drive all the piling on the line of the railroad between the points on said line as designated in said contract; and the defendant covenanted and agreed that he would give the plaintiff the right to drive all of said piling, and pay him therefor seventeen and one-half cents per lineal foot of the piling so driven." The defendant contended that this was an erroneous construction of the contract, and he excepted to the above instruction, and insisted that the defendant was bound to give the plaintiff employment on the work until finished, but that there was no obligation upon his part to give the plaintiff the driving of all the piling.

The contract does not expressly provide that the plaintiff was to have the exclusive right to drive all the piling. He "agrees to drive on said line until all the piles are driven to Estherville." It appears to us that this required the plaintiff to remain in the employment of the defendant until all the

work should be finished, and to drive piling wherever required so to do by the defendant at any point on the line. The rights of the parties were about the same as if the defendant had hired the plaintiff, with his pile drivers, to drive piles at so much per day, and that plaintiff should continue at the work until it should be completed from Clarion to Estherville. The only provision of the contract which leaves this construction doubtful is that part of it which requires the plaintiff to push the work so as to keep out of the way of the track layers. Without a knowledge of the work to be done, and of the acts of the parties under the contract, there would be strong grounds for holding that, under this provision, the parties contemplated that the plaintiff was to drive all the piling for the whole distance. But it is always competent, in construing a contract, to show the situation of the parties, the subject-matter of the contract, and the acts of the parties under the contract, as showing what the parties understood to be their obligations; and this is no infringement of the rule that the contract cannot be explained or varied by parol. "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." Code, § 3652. Now, whether the plaintiff understood that he had the right, under the contract, to drive all the piling between the points named, or only to work on the job until it was completed, it is very plain that he had good reason to suppose that the defendant did not understand that plaintiff was to do all the work.

The plaintiff commenced his work at Clarion, and at about the same time one Furguson commenced driving piling at Livermore, a point on the line northwest of Clarion. Furguson had a contract with the defendant. The plaintiff knew before he commenced work that some one was to drive piling on the same line. Furguson continued at work from Livermore northwest on the line all of the summer and fall, and completed the work up to near Emmetsburg by the time plaintiff

reached Livermore. The plaintiff was then ordered by the defendant to move up to Emmetsburg, which he did, and, after doing some work just south of that place, he moved up north of the town, and was driving piling in a lake, when, as he alleges, the defendant refused to allow him to continue on the work. Now the material part of these acts of the parties is that the plaintiff admits that he knew in July that Furguson was at work at or near Livermore, and he knew that Furguson was working towards Emmetsburg. He testified in part as follows: "I did not request Furguson to come and help me on Des Moines river bridge. He did come and drive some on that bridge with me. I did not request him to come, nor did I object to his coming. I might have told Furguson I was afraid the track-layers would catch me. Furguson came down to see me about coming down to drive piling. He said he did not want any body on his work, and he did not want to go on anybody else's work without consent. I said I supposed there was as much work as we all could do; that it did not make much difference where he worked."

During all this time the plaintiff made no objection or complaint to anyone about Furguson working on the line. This shows quite clearly what the parties understood by the requirement that the plaintiff should rush the work and keep out of the way of the track-layers. He was required to do this upon the work assigned to him from time to time. This being our view of the proper construction of this contract, it follows that the cause must be reversed, because it was tried upon an entirely different theory.

In view of a new trial, we deem it proper to say that the plaintiff has no ground of complaint, and no proper claim for damages, for not being allowed to do the work which was done by Furguson between Livermore and Emmetsburg. If he was wrongfully turned away, and refused work from Emmetsburg to Estherville, and until the job was completed, he is entitled to whatever damages, if any, he sustained from that wrongful act and breach of the contract. REVERSED.

HEATON V. KNIGHT ET AL.

65	434
114	125

1. **Tax Sale and Deed: NOTICE TO REDEEM: PERSON TO WHOM LAND IS TAXED: STATUTE CONSTRUED.** When the person to whom land is to be taxed has been ascertained and made of record by the assessor, and his book has been returned to the county auditor, the land is to be regarded as taxed to that person, within the meaning of section 894 of the Code, and from the time of the assessor's return until the tax duplicate is delivered to the treasurer, the auditor's office is the place to learn to whom the land is taxed; and the person to whom the land is thus taxed is entitled to the notice to redeem provided by said section. Until the assessor's return is made, the land is to be presumed to be taxed to the same person as the year before. Original opinion, 63 Iowa, 686, adhered to. REED and ADAMS, J J., *dissenting*.

Appeal from Madison District Court.

FRIDAY, DECEMBER 12.

Ruby & Wilkin, for appellants.

McCaughan & Dabney, for appellee.

OPINION ON REHEARING.

ROTHROCK, CH. J.—A petition for rehearing was entertained in this case, because some of the members of the court were inclined to doubt the correctness of the principal point in the original opinion. (63 Iowa, 686.) The question has been fully argued upon the rehearing, and the whole record has been again examined by the court, and in the light of the reargument we adhere to the opinion already filed; and we do not deem it necessary to elaborate the discussion of the question further than to say that, the object of the law being to give notice to the owner of the land, it is the duty of the purchaser to examine the records and ascertain in whose name the land is taxed. This record is to be found in the auditor's office long after the levy of the taxes by the board of supervisors, and until the tax-books are placed

 Adams v. Snow.

in the hands of the treasurer. The name of the person to whom land is to be taxed is ascertained and made of record by the assessor, and is to be found in the auditor's office, and, from the time of the return of the assessor until the tax duplicate is delivered to the treasurer, the auditor's office is the place where the information upon which to base the notice may be found. If we were to take the phrase "is taxed" in its literal sense, there would be a time between the payment of the tax for one year and the levy of the tax for the next year when the land would not be taxed to any one, and we think it may be properly held that until the land is listed for taxation it may be said that it "is taxed" to the same person as in the previous year; but when it is listed for taxation in the name of another, we think from that time it may properly be said to be taxed to that person, in view of the object and intent of the statute.

The former opinion is adhered to, and the decision of the district court is

AFFIRMED.

REED, J., *dissenting*. In my opinion the land was not taxed for the year in question until the tax for that year was levied by the board of supervisors.

ADAMS, J., concurs in this dissent.

65	435
81	55
65	435
99	65

 ADAMS v. SNOW.

1. **Tax Sale and Deed:** NOTICE TO REDEEM TO PERSON TO WHOM LAND IS ASSESSED. The person to whom land is assessed when notice of the expiration of the time for redemption from tax sale should be given, is the person to whom it is "taxed," within the meaning of § 894 of the Code, and the right of such person to redeem cannot be cut off by a treasurer's deed made in the absence of such notice. *Heaton v. Knight*, 63 Iowa, 686, (S. C. *ante*, p. 434,) followed. REED and ADAMS, J J., *dissenting*.

2. **Taxes: WHEN LEVIED: PRESUMPTION.** The statute requires taxes to be levied in September, and it will be presumed in a particular case that the levy was made in that month.
3. —: **ASSESSMENT: CHANGE OF NAME BY AUDITOR.** When the county auditor, in transcribing the assessment roll, finds land taxed to one not the owner, he has authority, under §§ 837, 841 of the Code, to substitute the name of the owner as shown by the plat book in his custody, and such assessment to the owner is notice to a purchaser at tax sale that the land is taxed to the owner.
4. **Tax Sale and Deed: REDEMPTION: TENDER.** Where one seeks to redeem from a tax sale and deed, where the deed is void for want of the statutory notice to redeem, he is not required by § 897 of the Code to show that he has tendered to the holder of the deed the amount necessary to redeem the land.

Appeal from Clay District Court.

FRIDAY, DECEMBER 12.

ACTION in chancery to enforce the right of redemption from a tax sale and deed. A demurrer to the petition was sustained, and, plaintiff refusing to amend or plead further, her petition was dismissed. She now appeals to this court.

Parker & Richardson, for appellant.

E. E. Snow, pro se.

BECK, J.—I. The petition alleges the following facts: That the land involved in the action was, in 1878, sold for the taxes of 1875, 1876 and 1877; that at the expiration of three years from the date of the sale the treasurer executed to the purchaser a tax deed; that no notice was served upon any one of the expiration of the time for redemption, and no proof of, or attempt to prove, service of such notice was made; that an affidavit was filed showing that no person was in the possession of the land; that after the execution of the tax deed the grantee therein named, who was the purchaser at the tax sale, conveyed the land by quitclaim deed to plaintiffs; that prior to the execution of the tax deed the assessor of the proper township had assessed the land for taxation to one

Fulton, as the owner thereof, and returned his assessment roll, which was duly filed; that at the time of the assessment Fulton owned the land; that in transcribing the assessment the auditor inserted the name of plaintiff as owner of the land in the place of the name of Fulton, the title of the land being, at that time, in plaintiff, who was a resident of the county; and that no notice was ever given to plaintiff, in any manner, of the expiration of the time for redemption. It is shown by the answer that the time for redemption of the land expired on the eighth day of October, 1881, and the treasurer's deed was executed two days afterwards.

II. Upon these facts we are required to determine whether plaintiff is entitled to redeem. At the time the notice

1. TAX SALE
and deed:
notice to re-
deem to per-
son to whom
land is assess-
ed.

of the expiration of the right of redemption required by statute could and should have been given, the tax-books showed that the land was assessed to plaintiff. The statute requires such notice to be given to the person in whose name the land is "taxed" at the time of the service of the notice. Code, § 894; *Hall v. Guthridge*, 52 Iowa, 408. After lands are listed and assessed to a person named, and the assessment is returned to the auditor, they are to be regarded as "taxed" to him. The listing and assessing are done in order to subject the land to taxation, and when done the land is "taxed," within the meaning of the statute, to the person named as the owner in the tax-books. See *Heaton v. Knight*, 63 Iowa, 686, and opinion on rehearing, filed at the present term of this court, *ante*, 434. Under these decisions plaintiff's right of redemption cannot be cut off by a treasurer's deed, in the absence of the notice required by the statute.

III. Counsel for defendant question the correctness of *Heaton v. Knight*, and insist that land is not "taxed" until a levy of the taxes is made. The assessment, listing, and levy are separate and successive steps in the imposition of taxes. They are all intended to accomplish that end. The land, as it were, is first designated and brought within the

exercise of the jurisdiction of the taxing power by the assessment, the other steps are intended to determine the amount of the tax, and are proceedings to enforce the authority to tax, the first exercise of which was the assessment. Lands are thus subjected to taxation by the assessment, and when assessed are to be regarded as taxed. We discover no reason for doubting the correctness of the decision.

IV. Counsel's position, that the land involved in this suit was not "taxed," because the tax was not levied, is not supported by the facts. The taxes, we will presume,

2. TAXES: when levied: presumption. were levied before the expiration of the time for redemption, which was in October. The statute requires the

taxes to be levied in September. We will presume the levy was made in that month. It thus appears that, at the time the deed was made by the treasurer, the land was "taxed" to plaintiff, and, as no notice had been given to her, the deed was not authorized by law.

V. Counsel for defendant insist that the land was not lawfully assessed to plaintiff, and she was not, therefore, entitled to notice. This objection is based upon

3. —: assessment: change of name by auditor. the facts that the assessor listed the land to Fulton, and the auditor, upon transcribing the assess-

ment roll, substituted the name of plaintiff. The auditor is authorized to correct errors found in the assessments upon transcribing them. Code, § § 837, 841. The name of an owner may be inserted by him in the tax-book. *Conway v. Younkin*, 28 Iowa, 295. We will presume that in the exercise of his authority, under the sections of the Code just cited, he rightly substituted plaintiff's name.

VI. It would appear that, as the auditor is the custodian of the transfer books, which are doubtless kept to aid in the correct assessment of lands, he ought to have the authority to so correct assessments as to make them accord with these books as to the owners of lands.

VII. For another reason objection cannot be made to

the tax-books on the ground that they show the lands were assessed to Fulton. Plaintiff owns the land, and it is taxed to her. She could not defeat the assessment, and no reason can be given why defendant may claim that it is irregular. It is good against the owner of the land, and defendant and all the world had notice of the fact that the land was taxed to her. It cannot be claimed that the land was not taxed to plaintiff.

VIII. The defendant insists that under Code, § 897, plaintiff is not entitled to redeem, for the reason that she fails to show in her petition that she has made a tender of the amount required to make redemption.

4. TAX SALE
and deed:
redemption:
tender.

The section referred to provides that "no person shall question the title acquired under a treasurer's deed without first showing * * * that all taxes due upon the property have been paid by such person." The defendant insists that plaintiff cannot be permitted to redeem without showing that she has redeemed. This is the real effect of his position. If the requirement for the payment of taxes found in the section is applicable to the case, so far as to require the payment of the sum necessary to redeem, then is defendant's position correct, that redemption must be made before a court will enforce the right to redeem. The result of defendant's argument is absurd. The section is not applicable to the case before us. It contemplates the case of a tax deed lawfully made. The tax deed under which defendant claims title was made without authority of law, for the right to redeem still existed. The deed was therefore void. The defendant, by taking the tax deed, denied plaintiff's right to redeem; by his attempts to maintain his title under the deed he continues to deny plaintiff's right of redemption. The law, under these circumstances, does not require her to show that she tendered to defendant the sum required to redeem the land.

As the points we have determined settle plaintiff's right to redeem, and are decisive of the case, other questions dis-

 Birge v. The Chicago, Milwaukee & St. Paul R'y Co.

cussed by counsel need not be considered. The judgment of the district court is

REVERSED.

REED, J., *dissenting*. In my opinion the land was not taxed for the year in question until the tax for that year was levied by the board of supervisors.

ADAMS, J., concurs in this dissent.

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PI	388

65	440
132	13

BIRGE V. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

1. **Railroads: RIGHT-OF-WAY DAMAGES: CHOICE OF REMEDIES BY LAND-OWNER.** One whose land is taken for right of way by a railroad company, without compensation, is not confined to the statutory remedy provided for the assessment of his damages, but he may maintain an action for trespass. *Rush v. B., C. R. & N. R'y Co.*, 57 Iowa, 201, followed.
2. —: **RIGHT OF WAY: CONDEMNATION: NOTICE MUST NAME OWNER.** Section 1247 of the Code requires that a notice by publication for the condemnation of right of way for a railroad must be addressed *by name* to the person whose land is to be taken or affected, and an owner not so named will not be bound by a notice addressed to "all other persons having any interest in or owning any portion" of the land.

Appeal from Palo Alto District Court.

FRIDAY, DECEMBER 12.

ACTION to recover possession of certain real estate, and for damages. There was a judgment for the defendant. The plaintiff appeals.

Soper, Crawford & Carr, for appellant.

Geo. E. Clarke, for appellee.

ADAMS, J.—I. The land in question is occupied by the defendant for the use of its railroad, being a part of three

Birge v. The Chicago, Milwaukee & St. Paul R'y Co.

I. RAILROADS: tracts, of forty acres each, in Palo Alto county.
 right-of-way damages: The plaintiff shows by his petition that he
 choice of remedies by land-owner. became the owner of the three tracts on the twenty
 fourth day of September, 1881, by title derived
 through one Kate Perry, and that the defendant has constructed
 its track over the land, by reason of which he has sustained
 damages in the sum of \$100. The defendant moved to strike
 out so much of the plaintiff's petition as sets up a claim
 for damages, the motion being based upon the ground that
 the petition shows that the land has been taken for railroad
 right of way, and that the damages for such injury, if any,
 can be assessed only by the special tribunal provided by
 statute. The court sustained the motion, and the plaintiff
 assigns the ruling as error. At a former term of this court
 we held, in this case, that the ruling of the court was correct.
 After the opinion was filed, we discovered a case which had
 been overlooked by both court and counsel, in which it was
 held that damages may be recovered in an action of trespass.
Rush v. Burlington, C. R. & N. R'y. Co., 57 Iowa, 201.
 The opinion was very brief, and the ruling in question was
 contained in a single remark, and did not especially enlist our
 attention. We do not regard the question as one of great
 importance, and, while a majority would be satisfied on prin-
 ciple to adhere to the original opinion, we do not feel justified
 in overruling the case above cited, and it follows that the
 motion to strike out the claim for damages should have been
 overruled.

II. There is one other question in the case which was
 determined by the former opinion, with which decision we
 are content, and we desire to add nothing further in its sup-
 port; and, as that opinion will not be published, we here
 incorporate so much of the former opinion as pertains to
 that question:

"2. We come now to the second and only remaining
 branch of this case. The defendant, by way of answer,

2. ———: right
of way: con-
demnation: ment under the statute, and condemnation of the
notice must land. To the answer the plaintiff demurred, and
name owner. the demurrer was overruled. An assessment, it appears, was
made, and the only question presented is as to the sufficiency
of the notice to bind this plaintiff. The notice given was a
notice by publication, and the person who was the owner at
that time was not specifically named therein. The defendant,
however, insists that no notice was necessary, and that,
besides, if it was, the notice was sufficient, for that, while
it is true that the owner was not specifically named in the
notice, he was otherwise described. The notice was in these
words: *'To Kate Perry * * * and all other persons
having any interest in or owning any of the following
real estate,' etc.* Kate Perry, it appears, was formerly the
owner. Just prior to the commencement of the proceedings
she sold and conveyed to one Conable, who afterwards con-
veyed to the plaintiff. The defendant, failing to discover the
conveyance of Kate Perry, proceeded as if she still remained
the owner. Whether it would be competent for the legisla-
ture to provide for the taking of land for a public improvement
without notice to the owner, we need not determine. Our
legislature has not so provided. It has, on the other hand,
expressly prescribed a notice. Having done so, we must hold
that a notice is necessary. The only question to be consid-
ered, then, is as to whether the notice in question was a notice
to Conable, the plaintiff's grantor, and the owner at the time
of the proceedings for condemnation. If it was a notice to
him, it must have been by reason of its embracing the words
'all other persons having any interest in, or owning any of,
the following real estate.' As to whether it was sufficient
depends upon the statute under which it was given. The
words above quoted, as contained in the notice, are the words
of the statute. Code, § 1247. But it also provides that the
company shall 'name each person whose land is to be taken
or affected.' It does not provide that it shall do so so far as

the persons are known, but the provision is unqualified. We cannot hold that the provision can be disregarded, or that a qualification can be ingrafted upon it by judicial construction. There would, indeed, be no possible question but for the provision requiring the notice to run to 'all persons,' etc.

"A cardinal rule of construction is that courts shall give force to every part of a statute or instrument, so far as they can do so consistently. If we adopt the construction which the company contends for in this case, we should hold virtually that it is immaterial whether the owner is named or not, providing some one is named. We should, as it seems to us, virtually nullify an express provision. On the other hand, we can give force to the provision, and still not hold that the other provision is useless. The notice, while not operative as constructive notice to 'other persons,' might have the effect to actually notify them, and if they should appear at the assessment, as they might be expected to if notified, the object would be accomplished. The provision in this view would seem to be a wise one. The relation of the railroad company to the land-owner is entirely different from that of the plaintiff to the defendant in an action. The claim of the company is not to be resisted. Such being the case, it is to be supposed that the land-owner would embrace the earliest opportunity to secure a legal assessment, and that, too, without regard to the question as to whether he had been notified in such a way as to bind him if he should not appear. If one proceeding proves abortive, another would be instituted. The object of the statute is to provide the best notice practicable. But if the owner is not named in it we do not think he is bound by it. If we should adopt the construction contended for by the company, and hold that he is, it appears to us that an inducement would be offered to railroad companies to omit the name of the owner, and to name some third person, or some fictitious person, that they might enjoy whatever advantage they could from the absence of the owner.

"In our opinion the proceedings in this case for condem-

Rosecranes v. The Iowa & Minnesota Telephone Co.

nation were insufficient to bind Conable, and consequently they cannot now be set up against the plaintiff. We think that his demurrer to the answer should have been sustained."

REVERSED.

ROSECRANES V. THE IOWA & MINNESOTA TELEPHONE CO.

1. **Continuance: FACTS NOT ENTITLING TO: SICKNESS OF ATTORNEY: SURPRISE.** A third continuance of this cause was asked in the court below on the ground of the sickness of one of the attorneys, and of surprise by an amendment to the pleadings, but the court overruled the application. *Held*, in view of the facts, (see opinion,) that the court did not abuse its discretion in the matter, and that its ruling should stand.
2. **Practice in Supreme Court: QUESTIONS REQUIRING THE EVIDENCE: DEFECTIVE ABSTRACT.** This court cannot pass upon questions relating to the evidence,—such as the sufficiency of the evidence to support the verdict, the propriety of instructions, and the like,—unless the abstract claims to contain all the evidence.

Appeal from Butler District Court.

FRIDAY, DECEMBER 12.

ACTION to recover damages caused by the defendant's negligently permitting certain wires, which had been stretched on poles in the city of Waverly, to sag down, while defendant was repairing the wires erected by it in the streets of the city, whereby the plaintiff, who was passing along said streets, was injured, without negligence on his part. Trial by jury, verdict and judgment for the plaintiff, and defendant appeals.

McCeney & O'Donnell, for appellant.

D. W. C. Duncan and *H. C. Hemenway*, for appellee.

SEEVERS, J.—I. This action was commenced in March, 1882. On motion of the defendant, continuances were

granted in May and October, 1882. On the first day of the May term, 1883, the defendant filed a motion for a continuance, on the ground that its principal counsel was sick, and unable to attend the trial. This motion was overruled, and it is insisted that the court erred in so doing. The facts seem to be as follows: J. M. Griffith, in his life-time, was president of the defendant, and its principal attorney. Boies & Couch were associated with him; and they relied on Griffith to prepare the case for trial. Because of his inability to be present in October, 1882, Fred. O'Donnell, Esq., was employed to assist in the trial of this case, and he appeared, in connection with Boies & Couch, for the plaintiff, at the last-named term. Mr. Griffith died, and W. J. Knight was elected president of the company; and Mr. Boies states, in an affidavit filed by him, that he relied on Mr. Knight to prepare the case for trial at the May term, 1883. Mr. Knight was unable to be present at that time because of sickness, and, because of his absence, a continuation was asked. The motion was overruled on the eighth day of May, and on the tenth of May the trial was postponed until the fourteenth or fifteenth of May, when the case was tried; Mr. O'Donnell being present at that time. Under the circumstances above stated, we cannot say that the court abused the discretion with which it is invested. The facts are materially different from those in *Rice v. Melendy*, 36 Iowa, 166.

It will be assumed that Mr. Boies relied on Mr. Knight to prepare the case for trial; but why he did so, when Mr. O'Donnell had taken Mr. Griffith's place, we are unable to understand. It does appear, however, that O'Donnell had never devoted any time to the preparation of the case for trial. The case was continued for nearly a week, and we are forced to the conclusion that the court was justified in believing that the distinguished counsel who appeared for the defendant could, with reasonable diligence, prepare themselves to properly present the legal questions involved in that time, if they had previously paid but little attention to the case.

When a case has been continued for two terms on the application of a party, reasonable diligence should be shown before another continuance is granted. During the progress of the trial the plaintiff amended the petition, and counsel for the defendant claim that they were taken by surprise, and were not prepared to meet the new or additional facts pleaded, and therefore asked for a continuance. The application was correctly overruled. The amendment was not so material as to require a continuance. We think it could have been made after a verdict, in response to a motion for a new trial, on the ground that the evidence did not correspond with the allegations of the petition.

II. It is said that the verdict is not sustained by the evidence. But, as the abstract fails to state that it contains all the evidence, we are unable to say whether the claimed position is true or not. It is insisted that the court erred in stating the issues to the jury in this: The court stated that the plaintiff claimed in the petition to have expended certain money for medical treatment; and the statement made by the court in this respect is correct. But the point made is, as there was no evidence introduced to sustain the allegation, that the defendant was prejudiced by what the court said. In this we do not concur. The court did not direct the jury to allow, or even take into consideration, the question whether the plaintiff was entitled to anything for money paid for medical attendance.

III. The fourth instruction given by the court is as follows: "When an employer gives his servant general directions as to the business which is intrusted to him to perform, then the employer is held to have confided in the discretion of the servant, and is answerable for all the acts of the servant in the performance of the duty required." As an abstract proposition, this instruction is correct, but counsel say there was no evidence to support it. The sixth instruction is objected to, and in relation thereto counsel say: "It is given upon the theory that there was a dispute in the evidence as

Ryce v. Mitchell County.

to whether it was necessary and proper to remove the Bowman line. There was no such dispute." It is obvious that we cannot determine whether the foregoing objections are well taken, because of the failure of the abstract to state that it contains all the evidence; and this is true as to the seventh instruction, which is objected to. Nor can we say, for the same reason, that the third and fourth instructions asked should have been given. The eighth instruction is criticised. We deem it sufficient to say that in our opinion the points made are not well taken.

IV. It is urged that the court erred in admitting certain evidence as to what took place before the city council of Waverly. We assume that counsel refers in this connection to the evidence of Wooding. We have examined this evidence, and reach the conclusion that it was not prejudicial. Nor do we think the court erred in the admission of other evidence objected to.

AFFIRMED.

RYCE V. MITCHELL COUNTY.

- 1. Attorney at Law: DEFENSE OF PAUPER CRIMINAL: COMPENSATION: RECOVERY OF COUNTY: AFFIDAVIT.** An attorney at law who has defended a pauper criminal, under appointment of the court, is not entitled to the compensation provided by law (Code, § § 3829, 3830) "until he files his affidavit that he has not directly nor indirectly received any compensation for such services from any source." See Code, § 3831. An affidavit attached to the account, as presented to the board of supervisors, that it is just and true, and wholly unpaid, is not sufficient.

Appeal from Mitchell Circuit Court.

FRIDAY, DECEMBER 12.

THIS action was originally brought before a justice of the peace. Plaintiff is an attorney at law, and he brought the

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action to recover from the county the sum of \$100, as compensation for his services in defending a person who was indicted and tried in the district court of the county for a felony. Plaintiff was appointed by the district court to defend the party, and the services for which he seeks to recover compensation were rendered in an appeal to this court from a judgment of conviction by the district court. The justice sustained a demurrer to plaintiff's petition, and, he electing to stand on this ruling, the justice entered judgment against him. He then removed the cause to the circuit court by writ of error. The circuit court reversed the judgment of the justice, and from this order the defendant appeals.

Cleland & Eaton, for appellant.

L. M. Ryce, *pro se*.

REED, J. —It was alleged in plaintiff's petition that he had presented his account for the services in question to the board of supervisors of the county, and that the board had refused to allow the same. Attached to the petition as an exhibit was a copy of said account, together with the affidavit of plaintiff which accompanied the account when it was presented to the board of supervisors. The ground of the demurrer to the petition in effect was that this affidavit was not sufficient under the statute, and for that reason plaintiff was not entitled to have the account allowed by the board of supervisors, and hence he could not maintain an action in the courts on the account; and the only question presented by the record for our determination is as to the sufficiency of said affidavit. The affidavit is as follows: "I, L. M. Ryce, do solemnly swear that the above account is just and true, and that the same has not been paid, nor any part thereof, as I verily believe." The liability of the county for the compensation of an attorney who is appointed by the court to defend a person who is accused of crime, and the amount which the attorney is entitled to receive as compensation for

his services under such appointment, is created and regulated by sections 3829 and 3830 of the Code. And it is provided by section 3831 that "only one attorney in any one case shall receive the compensation above contemplated. Nor is he entitled to this compensation until he files his affidavit that he has not directly nor indirectly received any compensation for such services from any source."

The objection urged against the affidavit in question is that it does not show that the attorney has not received compensation for his services from the person for whose benefit they were rendered, or from some other source. We think this objection is well founded. The object of the legislature in enacting the section of the statute quoted above is very apparent. It was to prevent attorneys from asserting claims against the county for compensation for such services in all cases in which they have received any compensation from the accused, or any other source. The account in question, as stated, was against the county for services rendered in the particular case. The affidavit was to the effect that the account—that is, the account against the county for those services—had not been paid, nor had any part of it been paid. This may all have been true, and yet the attorney may have received compensation from some other source for the services.

But it is said that, as the account could not be a just and true account against the county if the attorney had received compensation from any other source, the allegation in the affidavit that it "is just and true" is equivalent to a statement that he had not received compensation therefor from any other source. But the answer to this position is that it leaves the question to be determined by inference, or as a matter of conclusion from the language used, whereas the statute requires that the fact shall be sworn to directly and unequivocally. What the opinion or belief of the affiant was as to what it took to constitute a just and true account against the county in such case was known only to himself.

Mallory v. The Farmers' Insurance Company of Cedar Rapids.

As he is a lawyer, it might and perhaps ought, to be inferred that he meant by the statement that the circumstances were such as that the county was legally and justly liable for the claim; but it would have been very easy, if that is what was meant, to state the very fact which the statute requires to be stated; and, as the requirement of the statute is plain and certain as to what shall be stated, he ought not to be permitted to so frame his affidavit as to leave the question of his meaning a matter of conjecture or inference.

REVERSED.

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MALLOREY V. THE FARMERS' INS. CO. OF CEDAR RAPIDS.

1. **Insurance: PROVISION AGAINST INCUMBRANCE: BREACH OF: FACTS CONSTITUTING.** Where the property insured was a creamery owned by the plaintiff, but erected on her husband's land, and the policy provided that it should become void in case the insured property was encumbered without the consent of the company, and afterwards plaintiff joined her husband in a mortgage of the land, without reserving the creamery, *held* that the mortgage covered the creamery, and rendered the policy void.

Appeal from Buchanan Circuit Court.

FRIDAY, DECEMBER 12.

ACTION on a policy of insurance against loss or damage by fire. Trial by jury, verdict and judgment for the plaintiff, and the defendant appeals.

F. C. Hormel and *C. E. Ransier*, for appellant.

Woodward & Cook, for appellee.

SEEVERS, J.—I. The property insured consisted of a frame building used as a creamery, and certain personal property therein. The policy contained the following provision:

"This policy shall become void in each of the following instances, unless noted in the application or consented to by the secretary in writing herein, viz.: If the property in said policy or any part thereof be in any manner whatever encumbered." It was stated in the application that the creamery building was not incumbered, but that the land on which it was situated was incumbered by a mortgage for \$1,400. The land was owned by the plaintiff's husband, but the creamery was owned by the plaintiff, or at least the evidence tended to so show. The mortgage was executed in 1872 by the plaintiff and her husband. Afterwards, in 1877, the plaintiff, with her own money, under a parol license from her husband, as she claims, erected the creamery building on the mortgaged premises. The policy was executed in 1881, and counsel for the plaintiff insists that the mortgage did not create an incumbrance on the building because of its having been erected as above stated; that it did not become a part of the realty, but that it could have been sold on execution against the plaintiff, and removed without the consent of the mortgagee. Authorities are cited sustaining this proposition, and, without stopping to determine its correctness, it will be conceded. This being done, it follows that the creamery building was not incumbered at the time the policy was issued.

Afterwards, in September, 1882, the plaintiff and her husband borrowed \$1,700 of one Peck, and to secure the same executed a mortgage on the land on which the creamery building was situated. This mortgage was given for the purpose in part of paying the prior mortgage on the land, and when the mortgage to Peck was executed the prior mortgage was released. The Peck mortgage, without a doubt, was an incumbrance on the building. It was situated on the real estate and attached thereto, and was in no manner reserved from the operation of the mortgage, nor is there any evidence tending to show that Peck had knowledge that it had been erected under a parol license, or that it was not appurtenant

The State v. Fooks.

to the real estate. The court instructed the jury as follows: "If you believe from the evidence that, at the time the application was made, the plaintiff stated to the agent, Cummings, that her husband owned the land upon which the insured property was situated, and that she owned the creamery and the property insured; and that, in fact, the title to the land was in her husband, and the property insured was, in fact, owned by her; and that she also stated that there was no incumbrance upon the creamery and all of the property insured, and there was in fact none; and she stated that there was an incumbrance upon the land of \$1,400,—then you are instructed that the defense set up in paragraph seven of these instructions is not sustained." This instruction is clearly erroneous, because of the fact above stated, that the Peck mortgage was an incumbrance on both the land and building, and the court should have so directed the jury.

REVERSED.

THE STATE V. FOOKS.

1. **Criminal Law : FALSE PRETENSES: FACTS CONSTITUTING.** Where defendant obtained property under the false pretense that he had purchased a farm in the neighborhood, *held* that this was a falsehood in regard to an existing fact, and sufficient to sustain a judgment of conviction.
2. —: **WAIVER BY DEFENDANT OF PRESENCE OF WITNESS.** It is competent for a defendant in a criminal case to waive the presence of one of the state's witnesses, and to agree to have his written testimony read to the jury. Compare *State v. Polson*, 29 Iowa, 133. *State v. Carman*, 63 Iowa, 130, distinguished.

Appeal from Hardin District Court.

FRIDAY, DECEMBER 12.

THE defendant was indicted, tried and convicted of obtaining certain property by means of false pretenses, and he appeals.

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106	114
65	452
116	289

T. H. Milner, for appellant.

Smith McPherson, Attorney-general, for the State.

ROTHBROOK, CH. J.—I. The indictment in this case charges the defendant with obtaining a watch and chain and a pair of bracelets from one T. H. Hollister by false pretenses. It is urged by counsel for the defendant that the falsehoods relied upon were not statements of existing facts, but were in the nature of promises to do and perform certain acts in the future. The allegations of the indictment, and the evidence in the case, and most of the questions made, are somewhat similar to the case of *State v. Fooks*, ante, 196, decided at the present term—the defendant in both cases being the same—and both transactions appear to have been parts of a general scheme of defendant to obtain money and property by falsehood and deceit. It was held in the other case that the false pretenses were sufficient to authorize a conviction. This is a stronger case against the defendant than that, because the defendant falsely represented to Hollister that he had just purchased a certain farm in the neighborhood, and this was the principal representation which induced Hollister to part with the watch and other property.

II. There are two or three questions which are not common to both cases, which we briefly consider. It is claimed that the evidence does not show that Hollister relied upon the representations made by the defendant, but upon representations made by another person whom the defendant called upon to vouch for his (the defendant's) financial standing and credit. As we read the record, this claim is not supported by the evidence. The jury were fully warranted in finding that the representations relied upon were made by the defendant.

III. By agreement of counsel for the state and the defense, the presence of one of the witnesses for the state was waived,

HOLLIS v. The State Insurance Company.

2. —: waiver by defendant of presence of witnesses. and a written statement of his testimony was read to the jury. It is objected that this was a violation of the defendant's constitutional right to be confronted with the witnesses against him. We think it is a right which may be waived by him. *State v. Polson*, 29 Iowa, 133. This agreement involved nothing more than a waiver of the manner of introducing the evidence for the prosecution. It was not an entire departure from the mode of trial, as in *State v. Carman*, 63 Iowa, 130, where the defendant waived a jury, and his guilt was found and pronounced by the court.

IV. The defendant was sentenced to confinement in the penitentiary for three years. It is urged that the punishment is excessive. We see nothing in the record to justify us in interfering with the judgment on this ground.

AFFIRMED.

HOLLIS v. THE STATE INSURANCE COMPANY.

1. **Insurance: POWER OF ADJUSTER TO WAIVE FORFEITURES.** An adjuster of losses does not, as a matter of law, have authority to bind the company by a waiver of forfeitures; and where his acts, if authorized, would amount to a waiver, it must be shown that they were authorized by the company before it can be held to be bound thereby.
2. —: **WAIVER OF FORFEITURE OF POLICY: FACTS CONSTITUTING.** Where the insured, at the time of the loss, has forfeited his right to recover on the policy, and the company, knowing the facts, continues to treat the contract as of binding force, thereby inducing the insured to act and incur expense in that belief, the company thereby waives the forfeiture. See authorities cited in opinion. *Fitchpatrick v. Hawkeye Insurance Company*, 53 Iowa, 335, distinguished.
3. **Practice: INSTRUCTIONS AS TO ISSUES: REFERRING JURY TO PLEADINGS: ERROR WITHOUT PREJUDICE.** It is not competent for the court to refer the jury to the pleadings to ascertain the issues; (*Bryan v. C., R. I. & P. R'y Co.*, 63 Iowa, 464;) *Porter v. Knight*, Id., 365; but where, as in this case, the court otherwise fully instructed the jury, so that no prejudice could result from the error, it is not ground for a reversal.

ADAMS, J., dissents from the argument, but concurs in the conclusions reached.

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Appeal from Polk Circuit Court.

SATURDAY, DECEMBER 13.

ACTION on a fire insurance policy. There was a verdict and judgment for plaintiff. Defendant appeals.

Wright, Cummins & Wright and *J. B. Johnson*, for appellant.

John A. McCall, for appellee.

REED, J.—I. The property covered by the insurance was an elevator at Radcliff, in Hardin county. At the time the insurance was taken, plaintiff was the sole owner, and the policy was issued to him. It contained the following provision: "If the title of the property is transferred, incumbered or changed, or if, without written consent hereon, there is any prior or subsequent insurance, * * * this policy shall be void." Defendant alleged in its answer that plaintiff, in violation of this provision, transferred the property to a partnership composed of himself and one Mahana; also that subsequent insurance to the amount of \$500 was procured to be taken on the property by another company; and it claims that the policy was avoided by this change of title to the property and the subsequent insurance. Plaintiff, in his reply, admitted the truth of these allegations, but alleged that defendant, after the loss occurred, and with full knowledge of all the facts with reference to the subsequent insurance and the change of title, notified and requested him to make proofs of his loss, and that, believing that said request was made by defendant with the intention to settle and pay said loss, he did, at large expense of money, labor and time, make proofs of said loss to defendant, and he claims that defendant thereby waived said provision of the policy. The evidence shows that soon after the loss occurred one C. J. Ballard, an adjusting agent for defendant, called on plaintiff with reference to the loss.

1. INSURANCE:
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It also tends to show that he had learned before he went to Radcliff of the subsequent insurance on the property, and that plaintiff then informed him of the change in the title to the property, and that, with knowledge of these facts, he directed plaintiff to make out and forward to defendant his proofs of loss, and gave him a blank form to be used for that purpose. Soon after this agent left Radcliff, plaintiff made out proofs of the loss and sent the same to defendant, but they were returned by said Ballard, with the information that in certain respects they were not satisfactory. He also sent him another blank form for said proofs, which plaintiff filled out and returned to defendant; but more than sixty days had elapsed since the loss when the second proofs were sent in.

The circuit court instructed the jury that the policy was forfeited by reason of the matters set up in the answer and admitted in the reply, and by reason of plaintiff's failure to give notice and furnish the proofs of loss within sixty days from the date of the loss, and that plaintiff could not recover, unless there had been a waiver by defendant of the forfeiture. The court also gave the following instruction: "The legal principle upon which the waiver of a forfeiture is based is this: A party to a contract, having a right to declare it forfeited, must exercise that right when called upon to act under the contract; he cannot recognize the contract as binding, and afterwards insist upon its forfeiture. In this case the adjuster, Mr. Ballard, represented the defendant, and for the purposes of this case *was the insurance company*; and a waiver of the forfeiture by him would bind the defendant to the same extent as if made by its highest officers. Whether Mr. Ballard *waived the forfeiture* is a question of fact which you will determine from the evidence. Plaintiff claims that the forfeiture of the policy was waived by the company, by asking and requiring proofs of loss of the elevator, after the company, through Ballard, the adjuster, had full knowledge of the facts of the forfeiture of the policy by reason of the sale of one-third interest in the elevator to Mahana, of the

subsequent insurance in the Phoenix, and of the failure to give notice and proofs of loss within sixty days after the loss. He claims that the insurance company, through Ballard, was fully informed of all the particulars of these several acts of forfeiture, and, knowing these things, instead of at once declaring the policy forfeited, Ballard asked and required proofs of loss of the elevator, and thus imposed upon plaintiff some labor and expense. Now, if all these claims and allegations of plaintiff are established by the evidence, you are authorized to say that the forfeiture of the policy was waived by the defendant, and you should find for the plaintiff; but if plaintiff has failed to prove any one of the aforesaid claims and allegations upon which he relies to establish a waiver, you should find in favor of the defendant. And you are further instructed that if Ballard, the adjuster, merely *advised* or *suggested* to plaintiff that he should send proofs of loss to the insurance company, or if you find that plaintiff sent the proofs of loss in pursuance simply of the requirement of the policy, or on its own motion, uninfluenced by Ballard either way, then, in either or any such event, you should find for the defendant. Nor would there be a waiver of the forfeiture of the policy by the defendant in case the adjuster, Ballard, advised plaintiff in substance that *he, Ballard, would not decide that question*, but that the company would or might decide it for or against plaintiff after receiving proofs of loss, and plaintiff forwarded proofs of loss to the company for its decision under these circumstances; and under this latter state of facts, also, the insurance company would not be liable."

The giving of these instructions is assigned as error by the defendant. By the first instruction the jury were told, in effect, that Ballard, the adjusting agent, had power to waive the forfeiture of the policy; and, in the second, they were told that, if he was fully informed with reference to the facts which created the forfeiture, and, while he was possessed of that information, required plaintiff to furnish proofs of the

loss, and this requirement imposed on plaintiff some labor and expense, the forfeiture of the policy was thereby waived. There was no evidence as to the extent of Ballard's powers as agent for defendant. It is shown simply that he was an adjusting agent, and that he called on plaintiff with reference to the loss; and it does not appear that he had any power or authority to settle or pay plaintiff's claim. He did not assume to have any such power. However well the duties and powers of an insurance adjuster may be known in the community, the law makes no presumptions with reference to them, and they must be shown in every case where the rights of the parties depend upon the question whether his acts were done with authority. *Wood, Ins.*, § § 396, 399. *Dickinson Co. v. Insurance Co.*, 41 Iowa, 286. We think, therefore, that the court erred in directing the jury, as matter of law, that he had authority to waive the forfeiture of the policy; and, as a waiver of the forfeiture could be inferred from his acts only in case he had authority either to waive it expressly, or to do such acts as would, in law, amount to a waiver of it, the court erred in directing the jury, without any evidence as to the extent of his authority, that a waiver might be inferred from the particular act done by him. The defendant was bound by the acts of its agent only in case they were done within the scope of his actual or apparent authority; and whether they were so done was a question of fact to be determined by the jury.

II. The general doctrine of the instructions is that if defendant, with full knowledge of the facts out of which the forfeiture of the policy arose, neglected to declare its intention of insisting on the forfeiture, but, by its acts, recognized and treated the policy as a valid and substituting contract between it and plaintiff, and induced him to act in that belief, it is precluded now from insisting on the forfeiture. This doctrine is excepted to by defendant. Its position is that, to constitute a waiver of the provisions of the policy providing for the forfeiture, the acts

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relied on must be attended with such equitable circumstances as would create an estoppel; and, as plaintiff was not induced by the acts in question to in any manner change his position with reference to the subject of the negotiation, and as the acts were done after the forfeiture occurred, they do not create an estoppel. We think, however, that this position is not tenable. The principle on which the waiver of a forfeiture has been maintained in such cases is undoubtedly similar to that of estoppel. It was so held by this court in *Viele v. Germania Ins. Co.*, 26 Iowa, 9. But we think it is not true that such waiver can be created only by such acts or conduct as would create a technical estoppel. Neither forfeitures nor estoppels are favored by the law, and it follows necessarily from this consideration that the waiver of a forfeiture may be sustained by circumstances which do not present the strong equities which would be required to create an estoppel. When plaintiff asserted a claim under the policy for the loss, and defendant was informed of the facts out of which the forfeiture grew, it had the right at once to treat the contract as at an end. If it had elected simply to remain silent, perhaps a waiver could not have been inferred from its silence. But if, with knowledge of the circumstances, it continued to treat the contract as of binding force, and induced plaintiff to act in that belief, the rule holding that it thereby waived the forfeiture is a very just one. We think, therefore, that the general doctrine of the instructions is correct, and it is well sustained by the authorities. See *Titus v. Glens Falls Ins. Co.*, 81 N. Y., 410; *Insurance Co. v. Norton*, 96 U. S., 234; *Webster v. Phoenix Ins. Co.*, 36 Wis., 67; *Northwestern Mut. Life Ins. Co. v. Germania Ins. Co.*, 40 Wis., 453; *Cannon v. Home Ins. Co.*, 53 Wis., 585.

It is claimed, however, by defendant that a different rule is established by this court in *Fitchpatrick v. Hawkeye Ins. Co.*, 53 Iowa, 335. It is held in that case that the insurer did not waive the forfeiture of the policy by requiring proofs of loss after being orally informed of the fact which created

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the forfeiture. The ground on which the holding is put is that, as the policy itself provided that the information should be communicated by the proofs of loss, and as the oral information was not full, the insurer had the right to demand that full information be communicated to it in the manner provided in the contract, before it determined the question of its liability; and, as the proofs were demanded to enable it to determine that question, it did not waive the forfeiture by demanding them. The distinction between the two cases is very apparent, and the doctrine of that case is clearly given in the instructions in question.

The court did not make a full statement of the issues, but referred the jury to the pleadings for information as to what the issues were. We have frequently disapproved this practice. See *Bryan v. Chicago, R. I. & P. Ry. Co.*, 63 Iowa, 464; *Porter v. Knight*, Id., 365. We would not disturb the judgment in this case on this ground alone, as the court did instruct the jury fully as to the questions of fact which they were to determine, and the parties could not have been prejudiced by the failure to instruct them as to the issues.

For the errors pointed out the judgment is reversed, and the case is remanded for a new trial.

REVERSED.

ADAMS, J., *dissenting*. I concur in the reversal in this case, but I do not think that what was said by the adjuster could be deemed to have the effect to waive the forfeiture, even if he had power to waive forfeitures. The case, in my opinion, so far as this point is concerned, is not distinguishable in principle from *Fitchpatrick v. Hawkeye Ins. Co.*

GRAY, GUARDIAN, v. McREYNOLDS ET AL., EXR'S.

1. **Contract to Break a Will:** CONSIDERATION: PUBLIC POLICY. A contract made by and between the father and grandfather of an infant legatee, on the one side, and an heir at law of the testator, but not a legatee under the will, on the other side, whereby it was agreed that the heir should resist the probate of the will, and that the father and grandfather should not insist upon the probate, and that the heir, in case the will should be set aside, should pay the infant legatee the amount of his legacy, (the object being to defeat the residuary legatee,) was void for want of consideration, and as being against public policy; and, though the will was set aside, and the infant lost his legacy thereby, yet his guardian could not maintain an action therefor against the estate of the heir who resisted the probate of the will,—he having, in the meantime, died.

Appeal from Wapello Circuit Court.

SATURDAY, DECEMBER 13.

THIS is an action by which the plaintiff seeks to recover the sum of \$1,000, and interest, upon an alleged oral contract set up in the pleadings. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendants appeal. The facts appear in the opinion.

Stiles & Beaman and *W. W. Cory*, for appellant.

H. B. Hendershott and *McNett & Tisdale*, for appellee.

ROTHROCK, CH. J.—The facts in the case, about which there is no dispute, are as follows:

J. W. C. McReynolds, of Jefferson county, in this state, died in May, 1870, leaving his wife, but no children, surviving him. He made a will by which he constituted Isaac D. Mowry his executor. He bequeathed to his wife \$5,000; to his mother-in-law, Sallie Mowry, \$350; to Madison McReynolds, Susan McReynolds and Martha McReynolds \$2,000 each; to John S. Gray, the infant son of his deceased sister,

the sum of \$1,000; to Willie McReynolds \$300; to his step-mother \$50; and the balance of his estate he bequeathed to the Masonic lodge at Abingdon, as a permanent fund to educate the orphan children of master Masons. There were one or two other bequests made in the will, not necessary to be mentioned here. This will was made but a short time before the death of the testator. By the will the principal part of the estate was intended to be bequeathed to his wife, and to his brother and sisters, and to the minor children of his deceased brother and sister, with a small amount to his wife's mother, and the residue was given to the Masonic lodge at Abingdon. Solomon McReynolds, the father of J. W. C. McReynolds, survived him, and, in the absence of a will, one-half of the estate would have gone to the wife, and the other half to Solomon McReynolds, the father.

In a short time after the death of the testator the will was filed for probate. The legatee, John S. Gray, was then some three or four years of age. His mother died within a month after he was born, and his grandfather, J. G. Gray, took charge and control of him, kept him, and, with some assistance from the father of the boy, clothed, sustained and cared for him as his own child. After the will was filed for probate, Solomon McReynolds made an agreement with the grandfather and father of the infant child that he (McReynolds) would resist the probate of the will, and that they, as the representatives of the child, should not insist on the probate, and that, if it was not probated, he (McReynolds) would pay to the child the amount of the legacy named in the will.

The contract, as stated by John G. Gray in his testimony, was as follows: Solomon McReynolds "came to my home, and his wife and Martha and J. W. McReynolds came there on, I think, about a week before the court at Fairfield, and asked me if I had got a letter from him. I told him I had. Said he, 'I want to break Joseph's will.' Says he, 'I want you to lay still and let me do it. I want the heirs to have every cent the uncle willed them, but I want to break that

will;' that Mowry wanted to destroy the property or the money, and I want to break that will and get the money out of the Masons' hands; that was the contract between him and me, that Johnny and the other minor heirs should have the money that the uncle willed them."

Solomon McReynolds appeared and resisted the probate of the will, and the same was set aside, and the application to have the same admitted to probate refused. No one appeared in the proceedings in behalf of the minor, John S. Gray. Solomon McReynolds afterwards died, without paying plaintiff the amount of the legacy, and this action is brought against his estate to recover upon the oral contract above set out.

The defendants demurred to the petition, objected to the evidence of the contract, and moved the court to direct the jury to return a verdict for the defendants, upon the grounds, among others, that the contract, as pleaded and proved, was without consideration, against public policy, and void. They also asked instructions to the jury to the same effect. All of these objections were overruled.

We think that upon these undisputed facts the plaintiff is not entitled to recover, for two good and sufficient reasons:

(1) The contract was without consideration. It may be conceded, for the purposes of the case, that the father and grandfather of the plaintiff had authority, by reason of their relation to the plaintiff, to make a contract which the plaintiff could enforce against Solomon McReynolds. But that is not the question here presented. There must be a consideration moving from some person. The promise in behalf of the minor to "lay still" and allow McReynolds to set aside the will was binding on no one. There was nothing to prevent the minor, and all his friends, guardians and protectors, from doing all they could to uphold the will. If they had done so, Solomon McReynolds could not have claimed, in the probate court, that they had contracted not to do so.

(2) But suppose we were to concede that the failure to

appear in support of the will was a consideration in support of the agreement. It appears to us that the object of the contract was against public policy, as tending to thwart justice. The avowed purpose was to prevent the Masonic lodge from receiving its legacy. It must be remembered that the plaintiff is seeking a recovery upon the contract made for his benefit. He must accept the contract as it was made. He cannot be allowed to divest it of any of its provisions because of his infancy. The evidence shows that the officers of the Masonic lodge were not advised of the contract. They knew nothing about it. Suppose that all of the beneficiaries under a will excepting one should unite in a contract with an heir that they would do nothing to uphold the will, and that the heir, if successful in defeating it, should pay their legacies, and this contract was made to defeat the legacy of the one not entering into the contract. It is very plain that such a contract is void as against public policy, and no recovery can be had thereon by any of the parties to it. The case of *Fulton v. Smith*, 27 Ga., 413, and other cases cited by counsel for appellee, are unlike the case at bar in their facts. They are cases of contracts between heirs and legatees where there was no "laying still" by any one of them. They were fair, open contracts, made to avoid family difficulties, for the purpose of an equitable and just distribution of property.

We think the court should have directed the jury to return a verdict for the defendants, because, upon the undisputed facts, the plaintiff was not entitled to recover.

REVERSED.

Ridenour v. The City of Clarinda.

RIDENOUR V. CITY OF CLARINDA.

1. **New Trial: MISCONDUCT OF JUROR: DISCUSSION OF CASE: AFFIDAVITS CONSIDERED.** A new trial was sought by defendant on the ground that one of the jurors had permitted the case to be discussed in his presence during an adjournment; but, upon consideration of the affidavits of the parties, (see opinion,) *held* that no facts were established thereby, as distinguished from legal conclusions, which showed prejudice to the defendant, and made it obligatory on the court to grant a new trial.

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Appeal from Page Circuit Court.

SATURDAY, DECEMBER 13.

ACTION for a personal injury received by plaintiff by falling upon a sidewalk, by reason of the same being obstructed by snow and ice, and dangerous to travel, as is alleged. There was a trial by jury, and a verdict and judgment for plaintiff. Defendant appeals.

Clark & Parslow and *N. B. Moore*, for appellant.

Hepburn & Thummel and *W. W. Morsman*, for appellee

ROTHROCK, CH. J.—The defendant filed a motion for a new trial, one ground of which was the alleged misconduct of one of the jurors who tried the case. The motion was supported by three affidavits, one of which is as follows: “I, W. C. Stillians, on oath, do say that I am a resident of Clarinda, and that I am acquainted with Horace Pratt, who was a member of the jury that tried the cause of *N. C. Ridenour v. The City of Clarinda*; that shortly before the said cause was submitted to said jury, and while it was pending, I was present with him in John Burrows’ drug-store, in Clarinda, and while he was present the merits of the case were fully discussed in his presence and hearing; that I myself said, in his presence, that ‘it is a given-up fact that the plaintiff has the judge;’ that it is patent to everybody that the judge is in favor of Newt., [meaning plaintiff,] and that his attorneys say he has an equal show with the jury; that a great deal more

was said than appears in quotation marks, and the case discussed from the beginning, and this juror made remarks concerning the case, saying that 'Morsman,' one of the attorneys in the case, 'was the best speaker and had the best voice;' and that the person to whom I was speaking replied that it was admitted that the plaintiff had the judge; that I did not know at the time I was talking that Horace Pratt was a member of the jury, and that he never made it known to any one that he was a juror, and never asked any one to desist, but waited and listened to the discussion for at least fifteen minutes; that he staid for awhile after it was suggested by some one that he [Pratt] was a juror; that I never would have discussed the case had I known he was a juror, and ceased as soon as I discovered it. All the above facts and statements are true, as I verily believe, so help me God." The other two affidavits corroborate that of Stillians in part, and in one of them it is stated that, when some one suggested that Pratt was a juror, he (Pratt) said: "Go ahead, boys; I will soon have the case decided;" and then retired.

The plaintiff, in resistance to the motion, filed the affidavit of the juror Pratt, in which he admitted that he was in the drug-store a few minutes, but that he heard no discussion in regard to the case; that when he went into the drug-store he heard Stillians say to some person there present that "Morsman has the judge," or "generally has the judge," and that he (Pratt) said, "I guess that is because Morsman is generally right;" but that he did not know, and had no reason to suppose, that the remark of Stillians was in reference to the case then on trial, and that some one said that he (Pratt) was a juror in the case, and he then said, "I guess I had better retire, for if I was to stay and hear anything that the case might be decided." The juror was corroborated in most particulars by the affidavit of another person who was present at the conversation, and with whom the juror went away from the drug-store.

Another affidavit was filed by the defendant, in which it

Eldenour v. The City of Clarinda.

was stated that the cause was fully discussed upon its merits in presence of the juror, and that he said, "Go on with the case; I will soon have it decided." The court overruled the motion, and the defendant now insists that the ruling was erroneous, and that the judgment should be reversed.

It is the usual practice for the court to direct the jury that they must not join in conversation about the case pending the trial, and that, if persons engage in such conversation in their presence, they must retire, and not take part in the conversation, or admonish those engaged in the conversation that they are jurors, and request them to cease discussing the case. We cannot believe that any prejudice resulted from the conversation in the presence of the juror. It is not claimed that he entered into any discussion of the merits of the case. There is no impropriety in anything that he said, and what he did say in no manner indicated that he had any bias or feeling in the case. The facts set out in the affidavit do not disclose conversation that would influence the juror. It is stated in the affidavits that the case was fully discussed on its merits. This would not be possible in a conversation of a few minutes. If the case was discussed upon its merits, the facts should have been set out as distinguished from the conclusion of the affiants, so that the court could determine for itself, without accepting conclusions, whether or not the discussion tended to prejudice the defeated party.

The defendant cites us to the case of *Stafford v. The City of Oskaloosa*, 57 Iowa, 752, and *Ensign v. Harney*, 15 Neb., 330, as sustaining the motion in this case. Those were cases where attorneys of the successful parties were guilty of most flagrant misconduct in their social intercourse with jurors, by which the jurors were placed under personal obligations to them. The cases are not at all parallel with the case at bar. They involve misconduct of the attorneys of the successful parties, as well as misconduct of jurors.

AFFIRMED.

GARRETSON V. THE HAWKEYE INS. CO.

1. **Insurance: LIMITATION OF ACTION ON POLICY: WAIVER OF: FACTS NOT CONSTITUTING.** Where a policy of fire insurance provided that no action should be maintained thereon if begun more than six months after the loss, and the company's adjuster agreed with the assured what the amount of the loss was, and the company proposed to pay that amount on certain conditions, which failed, and the company then, five months before the six months had expired in which the assured could bring this action, notified the assured that it would not pay, *held* that the company did not, by these acts, waive its right to insist that the action should be begun within the six months named in the policy.

Appeal from Woodbury Circuit Court.

SATURDAY, DECEMBER 13.

ACTION on a policy of insurance against loss or damage by fire. The court directed the jury to find for the defendant, which they did, and plaintiff appeals.

Taylor & Healy and *J. H. & C. M. Swan*, for appellant.

R. W. Barger, for appellee.

SEEVERS, J.—The policy was issued to one Edmunds, who, after the loss, assigned it to the plaintiff. The loss occurred on October 19, 1881, and proofs of the loss were furnished the defendant on November 21, 1881. This action was commenced on the seventh day of August, 1882. The defendant pleaded that the action was barred, because it had not been brought within the time fixed in the policy. The plaintiff replied that the defendant had waived such defense, and was estopped from setting the same up.

I. The provision of the policy on which the defendant relies is as follows: "And provided, further, and it is hereby expressly covenanted and agreed by the parties hereto, that no suit or action against this company, for the recovery of any claim under and by virtue of this policy, shall be sus-

Garretson v. The Hawkeye Insurance Company.

tained in any court of law or chancery, unless such suit or action shall be commenced within six months after the loss shall occur; and in case any such suit or action shall be commenced against this company after the expiration of the aforesaid six months, the lapse of time shall be taken and admitted as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding." In *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507, it was held, under a similar provision in a policy of insurance, that a right of action on the policy did not accrue until the expiration of sixty days after the proofs of loss had been furnished, and that the period of limitation fixed by the parties did not begin to run until that time. We assume, because it is not claimed otherwise, that the period of limitation thus fixed is binding upon the parties.

It is obvious, from the foregoing statement of facts, that this action is barred, unless such defense was waived, or the defendant is estopped from setting it up. The claimed waiver and estoppel are based upon the same facts. They are as follows: About the fifteenth of November, 1881, the defendant's adjusting agent made an examination in relation to the loss, and in substance recommended to the defendant that it should pay an amount agreed upon by him and the plaintiff. A few days after receiving the report of its adjuster, the defendant wrote to the assured as follows:

"NOVEMBER 23, 1881.

"D. F. EDMUNDS, Esq., OTO, IOWA—*Dear Sir:* We are in receipt of your proofs of loss. Inclosed we send you blank form of receipt to be signed by you, and by any and all parties to whom you may have assigned an interest in your insurance. When properly signed, forward receipts and your policy to any bank of this city. * * * Upon receipt of the above in due form, and the absence of any additional evidence, we will pay as per above receipt."

The receipt was duly signed and forwarded as directed by the defendant, but the policy was not returned. About the

fifteenth day of December, 1881, the defendant claimed to have made the discovery that the fire was not accidental, and then wrote the plaintiff and his attorneys that it would not pay as it had previously proposed to do. It is insisted, as we understand, that a simple adjustment of the amount of the loss amounts to an implied promise to pay, and constitutes a waiver of the conditions of the policy. It is obvious, it seems to us, that this cannot be so, because the defendant agreed to pay sixty days after it was furnished with proofs of loss, and when the loss was adjusted—that is, the amount agreed upon. The most that can be said is that the defendant thereby impliedly agreed to pay such amount subject to the conditions of the policy. The defendant waived nothing by agreeing upon the amount of the loss, nor was it thereby estopped from insisting that all the conditions agreed upon, on which its liability to pay depended, should be complied with. That is to say, it did not waive the condition of the policy that an action, if necessary to enforce payment thereon, should be brought within the time fixed by the policy.

II. It is further insisted that the defendant agreed to pay a specified sum when certain receipts were signed; but the promise was not absolute, but conditional. One of the conditions was that the policy was to be returned. As this was not done, the defendant was not bound to pay. Another was that the defendant reserved the right to decline to pay if additional evidence was discovered which showed that the defendant was not liable. It claimed to have discovered such evidence, and notified the plaintiff that it would not pay, as it had conditionally promised to do, within one month after the proofs of the loss had been furnished it. The plaintiff, therefore, had five months within which he could have brought his action, before it was barred under the conditions of the policy. If the plaintiff was induced to believe that the defendant would pay without suit, this was promptly retracted, and the plaintiff, in substance, notified that he must rely on his legal rights. As there was no dispute as to the facts above

 Stockberger v. Lindsey.

stated, there was nothing to submit to the jury; and the court correctly held that the plaintiff was not entitled to recover.

AFFIRMED.

STOCKBERGER V. LINDSEY.

65 471
102 250

1. **Witnesses: GARNISHEE: RIGHT TO FEES IN ADVANCE: JUDGMENT AGAINST GARNISHEE FOR REFUSING TO ANSWER.** Witnesses, including garnishees, may demand their mileage and their fees for one day's attendance in advance, and, if not so paid, they need not attend; but if they do attend without demanding their mileage in advance, they cannot then, as a condition to testifying, for the first time demand their mileage. And where a garnishee appears and demands mileage and one day's attendance as a condition to answering, and, upon the refusal by plaintiff to comply with such demand, he departs and refuses to answer, the court may rightly render judgment against him to the full extent of plaintiff's demand. Code, § 2984. Whether he might not, after appearance, be entitled to his fees for one day's attendance before answering, *quaere*.

Appeal from Adair Circuit Court.

SATURDAY, DECEMBER 13.

IN an action before a justice of the peace a judgment was rendered against the defendant as garnishee. She sued out a writ of error from the circuit court, and upon the hearing thereof the judgment of the justice was affirmed, and the defendant appeals.

Church & Don Carlos, for appellant.

J. E. Andrews and *J. Y. Culver*, for appellee.

SEEVERS, J.—The defendant was duly summoned to appear before a justice of the peace as a garnishee. In obedience to the summons she appeared, demanded "her fees of plaintiff, including mileage from home, before she would answer said garnishment, and plaintiff's attorney refused to pay said fees

unless so ordered by the court to pay them. The court thereupon ruled that the plaintiff was not compelled to pay her said fees." Thereupon the defendant "refused to remain in court and testify or answer said garnishment, and therefore the court rendered judgment for the amount of the judgment and costs against John Lindsey, on which she was garnished."

I. We are required to determine whether the justice erred in the ruling made by him, above stated. The statute provides that "where the garnishee is required to appear at court * * * he is entitled to the pay and mileage of a witness, and may in like manner require payment beforehand in order to be made liable for non-attendance." Code, § 2983. "Witnesses are entitled to receive in advance, if demanded, their traveling fees to and from court, together with their fees for one day's attendance. At the commencement of each day after the first, they are further entitled, on demand, to receive the legal fees for that day in advance. If not thus paid, they are not compelled to attend or remain as witnesses." Code, § 3674. Witnesses are entitled to receive traveling fees and for one day's attendance in advance, if demanded, if such demand is made at the time they are notified to appear. Possibly such a demand could be lawfully made at any time before they do appear, but if they appear they waive the right to demand or receive mileage, because the only demand that can be made after their attendance before the court is for one day's attendance, which must be made on the morning of each day. The defendant, as garnishee, was entitled to the same privileges, and no more. We have no occasion to determine whether the defendant could have lawfully demanded her fees for a day's attendance, because she did not do this, but demanded mileage, and to the latter we clearly think she was not entitled.

II. If the garnishee fails to appear and answer the interrogatories propounded to him without sufficient excuse for his delinquency, he shall be presumed to be indebted to the exe-

Lundak v. The Chicago & Northwestern R'y Co.

cution defendant to the full amount of the plaintiff's demand. Code, § 2984. The non-payment of the fees the garnishee was entitled to, if the same had been lawfully demanded, would have excused the failure to testify. Having been lawfully summoned, and having failed to so answer, the justice rightly indulged the presumption that the garnishee was indebted to the execution defendant, and he did not err in rendering judgment against her for such amount. The circuit court, therefore, did not err in affirming the judgment of the justice.

AFFIRMED.

LUNDAK V. THE CHICAGO & NORTHWESTERN RAILWAY CO.

65 473
127 579

1. **Appeal:** FROM JUSTICE'S COURT: AMOUNT IN CONTROVERSY: JURISDICTION. Where plaintiff sued in justice's court for \$40, and judgment was rendered in his favor for \$24, and the defendant appealed, *held* that the amount in controversy was \$40, and not \$24, and that, therefore, the circuit court had jurisdiction to entertain the appeal, under § 3575 of McClain's statutes, (Laws of 1880, Chapter 163,) and it was error to dismiss it.

Appeal from Benton Circuit Court.

SATURDAY, DECEMBER 13.

THE facts are stated in the opinion.

Hubbard, Clark & Dawley, for appellant.

No appearance for appellee.

SEEVERS, J.—The plaintiff commenced this action before a justice of the peace, and claimed to recover \$40. There was a trial, and a judgment was rendered by the justice in favor of the plaintiff for \$24. The defendant appealed to the circuit court, and, on motion of the plaintiff, the appeal was dismissed on the ground that the amount in controversy was less than \$100; and the trial judge has, in substance, asked

Lundak v. The Chicago & Northwestern R'y Co.

us to determine whether the appeal was correctly dismissed. The statute provides that "any person aggrieved by the final judgment of a justice may appeal therefrom to the circuit court in the county. But no appeal shall be allowed in any case when the amount in controversy does not exceed \$25." McClain's Code, § 3575. When the action was commenced and tried by the justice, the amount in controversy was \$40. If the plaintiff had appealed, as he might have done, the amount in controversy would have been the same. If the plaintiff could appeal, it would seem that the defendant should have such right, for it is reciprocal. An appeal from the judgment of a justice, by either party, "brings up a cause for the trial on the merits." Code, § 3590. On the trial of this appeal in the circuit court, the plaintiff, under the pleadings, could have recovered a judgment for \$40. By appealing, the defendant recognized the right of the plaintiff to such a judgment, and we therefore think the amount in controversy exceeded \$25, and that the court erred in dismissing the appeal.

REVERSED.

REPORTS
OF
Cases in Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA,
AT
COUNCIL BLUFFS, MARCH TERM, A. D. 1885,
IN THE THIRTY-NINTH YEAR OF THE STATE.

PRESENT:

HON. JOSEPH M. BECK, CHIEF	JUSTICE,
" AUSTIN ADAMS,	
" WILLIAM H. SEEVERS,	} JUDGES.
" JOSEPH R. REED,	
" JAMES H. ROTHROCK,	

STEWART, ADM'R, v. PHENICE ET AL.

1. Estates of Decedents: ADMINISTRATOR'S BOND: WHO MAY SUE ON.

Although an administrator's bond, given in 1868, ran to the county judge and his successors in office, it was intended for the security of all persons who might be interested in the administration of the estate, and under Code, § 2552, (Rev., § 2737,) any such person might maintain an action thereon. In this case, *held* that, after the removal of the administratrix who gave the bond, her successor might sue thereon for assets of the estate remaining in her hands.

2. —: POWERS OF SUBSTITUTED ADMINISTRATOR. Under sections 2348, 2349 of the Code, a substituted administrator succeeds to the duties and obligations as well as to the powers of the first administrator. *Shawhan v. Loffer*, 24 Iowa, 217, followed.

65	475
96	230
65	475
104	710
65	475
111	172

Stewart, Adm'r, v. Phenice et al.

3. —: REMOVAL OF ADMINISTRATOR: RIGHT OF SUCCESSOR TO SURETY BOND: RULE STATED. When an administrator is removed, and he retains in his hands funds of the estate which he fails to pay to his successor, and the debts of the estate, if any, have all been liquidated, then it would *seem* that the creditors and heirs or legatees are the only persons interested in the funds retained by the first administrator, and that they alone, and not the second administrator, can maintain an action thereon on the bond of the first administrator. But where, as in this case, the first administratrix failed to give notice of her appointment, and she was afterwards removed, retaining funds in her hands, it could not be said whether there were or were not debts owing by the estate, since creditors, if any, had had no notice to file their claims, and it being, in such case, the duty of her successor to give such notice, and to pay the debts, if any, it was his right to have for that purpose the money retained by his predecessor, and he was entitled to recover the same in an action against her and the sureties on her bond. *Kelley v. Mann*, 56 Iowa, 625, distinguished.

Appeal from Dubuque Circuit Court.

TUESDAY, MARCH 17.

ACTION on an administrator's bond. A demurrer was sustained to the petition, and judgment was rendered thereon for defendants. Plaintiff appeals.

Robinson, Powers & Lacy and *S. M. Pollock*, for appellant.

Fouke & Lyon, for appellees.

REED, J.—It is alleged in the petition, as amended, that in the year 1868 Peter Strain died intestate, leaving a widow and three minor children surviving him, and that his widow, Charlotte Strain, (now Charlotte Phenice,) was, on the fifteenth of April, 1868, appointed administratrix of his estate; that she gave a bond, with the other defendants as sureties thereon, conditioned for the faithful performance by her of the duties which should be imposed upon her by law as such administratrix; that there came into her hands as assets of said estate personal property of the value of \$7,110.59, and that she returned an inventory thereof as required by law,

and the same was appraised, and that she disposed of said property and received therefor the appraised value thereof; that she failed to perform the conditions of her bond, in this; that she did not publish notice of her appointment as such administratrix, as required by law, and that she did not file any report of her doings as such administratrix until June 5, 1883, more than fifteen years after her appointment; that she then filed a report, in which she showed that there had then come into her hands of the assets of said estate the sum of \$7,546.74 in excess of all debts of the estate paid by her, and the costs and expenses of administration, and her own distributive share of said estate as widow of the intestate, and in which she alleged that she was unable to pay this amount; that the circuit court thereupon made an order removing said administratrix, and plaintiff was thereupon appointed administrator of said estate, and has duly qualified as such, and that the circuit court adjudged and determined that said amount was due from said administratrix and was unpaid. It is also alleged that at the time of plaintiff's appointment as administrator of said estate said Charlotte Phenice had said amount of \$7,546.74 in her hands belonging to said estate, and that she neglected and refused to pay over the same to him, and that the estate is not fully administered upon, and the debts are not fully paid; and the prayer is for judgment for the amount against the administratrix and the sureties on her bond. The demurrer to the petition was filed by the sureties on the bond.

The grounds on which it was sustained by the circuit court are—(1) that the bond was to the county judge and his successors in office, and plaintiff is therefore not authorized to sue thereon; and (2) that it appears from the averments of the petition that the property which came into the hands of the administratrix has long since been disposed of and converted into money, and the proceeds converted by the administratrix to her own use, and, as neither the property nor the proceeds are now assets of the estate, plaintiff has no interest therein,

Stewart, Adm'r. v. Phenice et al.

and consequently no right of action therefor on the bond; but that the right of action on the bond, if any exists, is in favor of the creditors of the estate and the distributees.

I. The first ground of demurrer has not been insisted on in this court, and we think there is nothing in it. It is provided by section 2552 of the Code, (Rev., § 2787.) that "when a bond or other instrument, given to the state or county, or other municipal corporation, or to any officer or person, is intended for the security of the public generally, or of any particular individuals, suit may be brought thereon in the name of any person intended to be thus secured, who has sustained an injury in consequence of a breach thereof." Although the bond in question was given to the county judge and his successors in office, it was intended for the security of all persons who might be interested in the administration of the estate, and in the proper application of its assets, and if plaintiff is now entitled to have the money which the administratrix received as the proceeds of the sale of the property of the estate paid over to him, it is very clear that under said section he may maintain an action on the bond in his own name for its recovery.

II. As to the second ground of demurrer, defendants' position is that, when the administratrix converted the assets of the estate into money, the title and ownership of the money so received was in her; that her liability therefor was to the creditors of the estate, and to the heirs, for their distributive shares after the debts should be paid; that said money was not assets of the estate, and as plaintiff, as administrator of the estate, is entitled only to the assets, he cannot maintain an action for the recovery of said amount. That an administrator *de bonis non* at common law derived his title from the deceased, and not the former executor or administrator, is certainly true. *U. S. v. Walker*, 109 U. S., 258; *Beall v. New Mexico*, 16 Wall., 535; *Potts v. Smith*, 3 Rawle, 361. And it was held that he was

1. ESTATES of decedents: administrator's bond: who may sue on.

2. ———: powers of substituted administrator.

entitled only to the goods and personal estate which remained *in specie*. But in this state the powers and duties of a substituted administrator are defined by statute. Code, §§ 2348, 2349. It is held that he succeeds to the duties and obligations as well as the powers of the first administrator. *Shawhan v. Loffer*, 24 Iowa, 217. The administrator is charged with the duty of paying the charges and demands against the estate. Code, §§ 2418-2420. He is also empowered, with the approval of the court, to allow or approve claims against the estate, with the justice of which he is satisfied. Sections 2408, 2410. The statutes charge him with certain trusts in favor of the creditors of the estate. In *Cooley v. Brown*, 30 Iowa, 470, it is said: "Whatever ought to be applied to the payment of the debts ought to be recoverable by the administrator, representing the rights and interests of the creditors." And it is held in that case that the administrator may, for the benefit of the creditors of the estate, maintain an action for the recovery of property or its value, which had been voluntarily or fraudulently conveyed by the intestate. It is averred in the petition that the debts of the estate have not been paid, and this allegation is admitted by the demurrer.

Plaintiff, as administrator of the estate, is charged with the same duties and clothed with the same powers, with reference to these debts, as devolved upon the administratrix before her removal. It is his duty to pay them out of the assets of the estate, or out of any fund coming into his hands, which, under the law, should be applied to their payment. And he is empowered, we think, to maintain an action for the recovery of any sum in which the estate has an interest, and which ought to be so applied. That the money received by the administratrix for the property belonging to the estate constitutes a fund out of which the debts of the estate ought to be paid, is not controverted. But defendant's claim is that the liability therefor is directly to the creditors. If the adminis-

2. — : removal of administrator: right of successor to sue on bond: rule stated.

tratrix had given the notice of her appointment prescribed by the statute, this position would probably be correct as to creditors whose claims were filed and allowed. Section 2420 of the Code is as follows: "Other demands against the estate are payable in the following order: (1) Debts entitled to a preference under the laws of the United States; (2) public rates and taxes; (3) claims filed within six months after the first publication of the notice given by the executors of their appointment; (4) all other debts; (5) legacies." And section 2422 is as follows: "After the expiration of the time for filing the claims of the third of the above classes, the executors shall proceed to pay off all claims against the estate, in the order above stated, as fast as the means of so doing come into their hands." And section 2421 provides that claims of the fourth class, not filed and proved within twelve months of the giving of the notice of the appointment of the administrator, are forever barred.

It is alleged in the petition that the administratrix never published a notice of her appointment as required by law. If this be true, (and its truth is admitted by the demurrer,) the time for filing and proving claims against the estate had not expired at the time of her removal; for claims not then filed were not barred by section 2421, and the time for paying claims, as provided by section 2422, had not yet arrived, for by that section the administratrix was required to begin the payment of claims only upon the expiration of the time for filing claims of the third class. It could not be determined, then, at the time of her removal, what the amount of the claims against the estate was, and consequently it was uncertain whether the assets of the estate would pay the whole of the claims or not. It could not be determined then what amount any creditor was entitled to receive, for the administrator is warranted in paying the full amount of any claim only when it is definitely ascertained that the assets of the estate are sufficient to pay all claims of the classes which are preferred to it, and the full amount of those of the class to which

Stewart, Adm'r, v. Phenice et al.

it belongs. No creditor of the estate, then, has a claim which he can now enforce against the fund in the hands of the administratrix. Whether the whole amount of his claim, or only a share thereof in proportion to the claims of other creditors, can be paid, can be determined only when the full amount of all the claims is ascertained. We think, therefore, that plaintiff can maintain an action on the bond for the recovery of the fund in her hands. As it constitutes a fund for the payment of the debts of the estate, and as plaintiff is now charged with the duty of applying it in payment of said debts, her refusal to pay it over on the order of the court is a breach of the bond.

This holding is not at all in conflict with *Kelley v. Mann*, 56 Iowa, 625. The fund which the administrator *de bonis non* sought to recover in that case was the proceeds of a policy of insurance on the life of the intestate, which had come into the hands of the first administrator. Under the provisions of the statute, this money could not be appropriated to the payment of the debts of the estate, but descended directly to the heirs. The holding was that the substituted administrator was not entitled to the fund, but that the sureties on the bond of the first administrator were answerable on the bond to the heirs for their distributive shares. If there were no claims against the estate in this case, it would be governed by the same principle. The heirs would have their action on the bond for their distributive shares of the fund, but plaintiff would have no interest in it. But until the amount of the debts of the estate is ascertained, and they are paid out of this fund, the heirs can assert no claim to it. Their interest is in the residue remaining after all claims against the estate are paid.

The judgment of the circuit court will be reversed, and the cause will be remanded for further proceedings in that court.

REVERSED.

THE STATE V. BENTON.

1. **Practice in Supreme Court: REVIEWING INSTRUCTIONS WITHOUT THE EVIDENCE.** This court cannot say that instructions, which are correct as abstract propositions, were improperly given in a certain case, unless the evidence is contained in the record.
2. ———: **SURPRISE: OBJECTION TOO LATE ON APPEAL.** Where the case was called for trial, and defendant made no objection to proceeding to trial, he cannot for the first time in this court complain that he was not prepared for trial, because his counsel had no opportunity to consult with him and prepare his defense.

Appeal from Henry District Court.

TUESDAY, MARCH 17.

INDICTMENT for embezzlement. Verdict, guilty; judgment; and the defendant appeals.

L. G. & L. A. Palmer, for appellant.

Smith McPherson, Attorney-general, for the State.

SEEVERS, J.—This cause was submitted on a partial transcript, and we have before us the indictment, instructions, motion for a new trial, and certain affidavits in support thereof. But the evidence is not in the record before us, which we have examined, and readily reach the conclusion that the indictment is sufficient, and that the instructions given, as abstract propositions, are correct. Those in the record which were refused do not state the law correctly, and therefore were properly refused; or, if this is not so, we are unable to say, because of the absence of the evidence, that it was error to refuse them.

The affidavits filed in support of the motion for a new trial possibly tend to show surprise; that is, the claim is that counsel for the defendant did not have the opportunity to consult with his client and prepare his defense before the

The State v. Montgomery.

trial. But no application for a continuance on this ground was made. The case was called for trial, and no objection was made by the defendant's counsel that he was not, for any reason, ready to proceed. Besides this, in our opinion, the affidavits are clearly insufficient in other respects.

AFFIRMED.

THE STATE V. MONTGOMERY.

1. **Criminal Practice: AID TO DISTRICT ATTORNEY: EMPLOYMENT OF COUNSEL BY PROSECUTING WITNESS.** With the consent of the district attorney, the district court may permit attorneys employed by private parties (the prosecuting witness in this case) to assist in prosecutions;— following *State v. Fitzgerald*, 49 Iowa, 260; and this practice has been so long established in this state as to require an act of the legislature to abrogate it.
2. **Criminal Law: ASSAULT: SEVERAL ACTS IN ONE OFFENSE: EVIDENCE.** Where defendant, in seeking to prevent the prosecuting witness from crossing his farm, pointed a cocked revolver at him more than once, *held* that the several acts were but parts of the same transaction, and constituted but one assault, and that, while one act was sufficient to constitute an offense, all were properly shown to establish the *animus* of the defendant.
3. **Criminal Evidence: ANIMUS OF PROSECUTING WITNESS.** For the purpose of showing the feeling of the prosecuting witness toward the defendant, it was competent to prove that there had been difficulty between them; but to prove particular acts, such as that the witness had struck defendant, was not competent.
4. ———: **ASSAULT: INTENTION IN TAKING WEAPON.** One charged with committing an assault with a revolver should not be permitted to testify as to his purpose in taking the revolver with him, for, however innocent his purpose, it would not justify an assault with the weapon.
5. **Evidence: ERROR IN EXCLUDING: CORRECTION ON APPEAL: PRACTICE.** This court cannot say that there was error in not permitting answers to certain questions, when it does not appear what evidence was expected to be elicited.
6. **Criminal Law: ASSAULT WITH REVOLVER TO REMOVE TRESPASSER.** An assault with a revolver cannot be justified for the purpose of removing a mere trespasser from the premises of the assailant.

65	483
81	483
66	483
87	308
66	483
89	116

65	483
122	128

The State v. Montgomery.

Appeal from Marion District Court.

TUESDAY, MARCH 17.

UPON an information filed before a justice of the peace, defendant was convicted of an assault and battery. He appealed to the district court, and was again convicted, and now appeals to this court.

C. H. Robinson and Ayres Bros., for appellant.

Smith McPherson, Attorney-general, for the State.

BECK, CH. J.—We shall proceed to dispose of the objections urged by defendant to the judgment of the court below in the order of their discussion by counsel.

I. An attorney who had presented the case before the justice of the peace was, upon the request and consent of the

I. CRIMINAL
practice: aid
to district
attorney:
employment
of counsel by
prosecuting
witness.

district attorney, permitted to assist in the prosecution in the district court. This was made the ground of an exception in the court below, and the objection is renewed in this court. We

have held that, with the consent of the district attorney, the district court may permit attorneys employed by private parties to assist in prosecutions. *State v. Fitzgerald*, 49 Iowa, 260. This decision is questioned by defendant's counsel, for the reason that they think it is not well considered, and the decisions of other states are not referred to in the opinion. It will be observed that the decision is based upon the long existence in the state of the practice to which counsel object, —a consideration of more weight than decisions of other courts. The personal observation of some of us warrants the statement that the practice has prevailed in this state for more than forty years, and none of us have, until recently, heard it questioned. A practice so long and firmly established can only be abrogated by legislative enactment. But counsel for defendant think that this case should not be regarded

as within the rule of *State v. Fitzgerald*, for the reason that the assisting counsel was employed by the prosecuting witness. Under the long-prevailing practice, the prosecuting witness has always been permitted to employ an attorney to assist the officers in charge of the prosecution. Counsel for defendant think that, as the prosecuting witness may be held liable for costs, he is interested in the result of the prosecution, and therefore ought not to be permitted to employ counsel in the case. This consideration, we think, gives strong support to the justice and correctness of the practice. Surely the prosecuting witness, being liable for costs if the prosecution fails, ought to have the right to employ counsel for his own protection.

II. The assault of which defendant was charged consisted in pointing in a threatening manner at the prosecuting witness a cocked revolver. The evidence tends to prove that the prosecuting witness was forbidden by defendant to travel upon a certain road through a farm owned or controlled by defendant, and was compelled by the display of the revolver to leave the premises. In accomplishing his purpose of preventing the prosecuting witness from passing over the farm, defendant pointed the revolver more than once at the witness. Counsel now claims that the evidence shows more than one offense, and was therefore erroneously admitted, so far as it tended to prove more than one act. But all the evidence, in fact, pertains to but one transaction,—two continuous acts done for the purpose of driving the witness away from the premises. The separate acts of pointing the weapon constituted but one assault. While one act alone constituted an offense, all were properly shown, to establish the *animus* of the defendant. This view disposes of several objections made to the admission of evidence and instructions given.

III. Upon the cross-examination of the prosecuting witness he stated, in response to a question by defendant, that

2. CRIMINAL
law : assault :
several acts
in one offense :
evidence.

The State v. Montgomery.

3. CRIMINAL evidence: animus of prosecuting witness. there had been a difficulty between them. This evidence was competent to show the feeling of the witness towards the defendant. But the prosecuting witness was then asked if he had not struck the defendant, and an objection to the question was rightly sustained. If the fact had been shown, it would have been no justification for the assault, and would have led to inquiry into collateral matters not pertinent to the case.

IV. The defendant testified that he had no intention of using the revolver to assail the prosecuting witness, unless it became necessary. He was then asked what intention he had in taking the revolver with him, other than to defend himself. He was not permitted to answer the question. We think the court ruled rightly in rejecting the evidence. Whatever may have been defendant's intentions in arming himself, if they did not relate to the assault, they were irrelevant. If the defendant had the weapon in his hand for a proper and innocent purpose, this would not excuse him in pointing it in a threatening manner at the prosecuting witness.

V. An objection to evidence admitted by the district court, raised by the assignment of errors, is not argued by counsel, who content themselves with simply stating it. It is possible that we may not be required to pass upon it, but are authorized to regard it as abandoned. But, upon consideration of the objection, if we may be required to consider it without argument, we find that it is not well taken.

VI. Several questions were asked a witness (Horsman) by defendant, to which answers were not permitted. The rulings are now complained of by counsel. As it does not appear what evidence was expected to be elicited, we cannot determine that the rulings were wrong. *Votaw v. Diehl*, 62 Iowa, 675.

VII. Numerous objections are made to rulings upon the instructions. Many of them are based upon incorrect criti-

4. ——— : assault; intention in taking weapon.
5. EVIDENCE: error in excluding: correction on appeal: practice.

The State v. Montgomery.

6. CRIMINAL law: assault with revolver to remove trespasser. cisms and interpretations of the instructions given, and need not be further noticed. The instructions announce the rule that an assault with a revolver cannot be justified on the ground that the person assaulted was a trespasser, and the purpose of the assault was to remove the trespasser from the premises. The instructions are correct. It will not be claimed that a deadly weapon can be used in resisting a mere trespasser. It follows that an attempt to use such a weapon upon a trespasser is unlawful. Instructions asked by defendant were in conflict with the doctrine we have announced, and were properly refused.

VIII. The court correctly directed the jury upon the question of defendant's right of self-defense in case he was assaulted, or honestly believed that he was about to be assaulted, by the prosecuting witness, with a deadly weapon, which was claimed upon the trial. Other rules of the instructions given are correct. They demand no further attention.

IX. It is insisted that the verdict is not sufficiently supported by the evidence. We think differently. The judgment cannot be disturbed on this ground.

AFFIRMED.

LITTLETON V. FRITZ.

1. **Constitutional Law:** CHAPTER 143, LAWS OF 1884: SALOONS: NUISANCES: INJUNCTION BY CITIZEN OF COUNTY: RIGHT TO TRIAL BY JURY: EQUITY JURISDICTION: CIVIL ACTION FOR CRIMINAL OFFENSE: SPECIAL DAMAGE TO PLAINTIFF: INJUNCTION BEFORE CONVICTION. Under the provisions of § 12, Chapter 143, Laws of 1884, any citizen of a county where a nuisance is kept, in the form of a place used for the unlawful sale of intoxicating liquors, may maintain an action in equity to enjoin and abate it; and said act is not repugnant to the constitution, as depriving the defendant of the right of trial by jury, nor as being an attempt by the legislature to enforce a criminal law by a civil action, nor because it authorizes any citizen of the county to maintain the action for injunction without showing that he is especially damaged by the nuisance; and in such cases the court may grant a temporary injunction before the defendant has been convicted criminally for keeping the nuisance.

Appeal from Polk Circuit Court.

TUESDAY, MARCH 17.

THIS is an action in equity, by which the plaintiff, a citizen of Polk county, seeks to enjoin and abate a nuisance, which it is alleged the defendant keeps and maintains in a certain building in the city of Des Moines, by selling intoxicating liquors therein contrary to the law. A temporary injunction was prayed, and notice of the application therefor was served on the defendant, who appeared, and the motion for the injunction was sustained, and the writ was issued and served upon defendant. This appeal was taken from the order granting the temporary injunction.

Lehman & Park, W. S. Sickmon and Bills & Block, for appellant.

Baylies & Baylies, Smith McPherson, Attorney-general, Jed. Lake, James O. Crosby, S. P. Adams, Rickel & Bull and Remley & Remley, for appellee.

ROTHROCK, J.—I. The plaintiff does not aver in his petition that he has sustained, or will sustain, any damage or

1. CONSTITUTIONAL law: chapter 143, laws of 1884: saloons: nuisance: injunction by citizen of county: right of trial by jury: equity jurisdiction.

injury by the maintenance of the alleged nuisance, for which he can be compensated in a money judgment. He claims the right to maintain the action because he is a citizen of Polk county, and because the keeping and maintaining the nuisance in the county is a great damage and injury to the property, peace and safety of the plaintiff and other citizens of said county.

The case, therefore, turns upon the question whether any citizen of the county, where a nuisance of this character is kept, may maintain an action in equity to enjoin and abate it, and whether the court has the power under the law to order a temporary injunction in such cases. It is not disputed that the building or erection of whatever kind, in or at which intoxicating liquors are unlawfully manufactured or sold, is a nuisance. It was provided in section 926 of the Code of 1851, that "the places commonly known as 'dram-shops' are hereby prohibited, and declared public nuisances. * * *" The law with reference to the sale of intoxicating liquors has undergone many changes since 1851; but the unlawful traffic has always since that time been declared by legislative enactment to be a nuisance. The provision above cited has never been repealed. That the legislature has ample power to prohibit the manufacture and sale of intoxicating liquors has been settled law in this state for more than thirty years. Legislation upon that subject has been uniformly upheld and approved by this court since the decision in the case of *Our House v. State*, 4 G. Greene, 172, and the case of *Santo v. State*, 2 Iowa, 165. Thousands of persons have been prosecuted by indictment, fined and imprisoned in this state for the maintenance of nuisances in the keeping of saloons.

By chapter 143 of the Laws of the Twentieth General Assembly, the statute upon this subject was amended. It was made more sweeping in its provisions, by prohibiting the sale of all kinds of intoxicating liquors, under heavy penalties,

excepting sales for certain purposes by permit from the board of supervisors of the county. After providing for punishment for specific sales, the act, in its twelfth section, provides that, for violation of the law by unlawful sales, "the building or erection, of whatever kind, or the ground itself, in or upon which such unlawful manufacture or sale, or keeping with intent to sell, use, or give away, of any intoxicating liquor is carried on, or continued, or exists, and the furniture, fixtures, vessels, and contents, is hereby declared a nuisance, and shall be abated as hereinafter provided; and whoever shall erect or establish or continue or use any building or erection for any of the purposes prohibited in said section (the section of the law prohibiting sales) shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly, and upon conviction shall pay a fine of not exceeding \$1,000, and costs of prosecution. * * * Any citizen of the county where such nuisance exists, or is kept or maintained, may maintain an action in equity to abate and perpetually enjoin the same, and any person violating the terms of any injunction granted in such proceedings shall be punished as for contempt by a fine of not less than \$500, nor more than \$1,000, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment, in the discretion of the court."

This statute plainly authorizes any citizen of the county to maintain the action, and there can be no denial of the right of action, unless it be held that the legislature had no constitutional power to enact the law. Counsel for appellant contend that the statute is repugnant to sections 9, 10, 11 and 12 of article I of the constitution. These sections provide that "the right of trial by jury shall remain inviolate," and that in all criminal prosecutions, involving life or liberty, the accused shall have the right to a trial by jury, upon an indictment by a grand jury.

The question presented by counsel in argument may be stated in this general form: Is the statute under considera-

tion an attempt upon the part of the law-making power to deprive the citizen of the constitutional right to be tried by a jury? It is important at the outset to inquire: In what cases was the right of trial by jury inviolate when the constitution was adopted? for it will be observed that the provision is that the right "shall *remain* inviolate." This provision, or its equivalent, is common to the constitutions of many states of the Union, and it has been held that it secures the right of trial by jury in all cases in the trial of which a jury was necessary according to the principles of the common law. *Isom v. Mississippi Cen. R'y Co.*, 36 Miss., 300. In *Plimpton v. Town of Somerset*, 33 Vt., 283, it is said that "the general rule of construction in reference to this provision of the constitution is, that any act which destroys or materially impairs the right of trial by jury, according to the course of the common law, in cases proper for the cognizance of a jury, is unconstitutional."

The jurisdiction of courts of equity to enjoin and abate nuisances is of very ancient origin. In 2 Story, Eq., 921, this language is employed: "In regard to public nuisances, the jurisdiction of courts of equity seems to be of very ancient date, and has been directly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances strictly so called, but also to *purprestures* upon public rights and property." This general rule is not, and cannot be, disputed. Courts of equity in nearly all the states of the Union entertain jurisdiction to restrain and abate nuisances, either at the suit of a public prosecutor, or at the instance of a private individual, who shows that he sustains some special injury by the establishment or existence of the nuisance.

Such a case being of equitable cognizance, neither party could, at the time of the adoption of the constitution, demand a jury trial as matter of right. There was no statute law or constitutional provision then in force which gave an absolute right to a trial by jury in an equity case. *State v.*

Orwig, 25 Iowa, 280; *Clough v. Seay*, 49 Iowa, 111. All actions in equity were required to be tried by a chancellor. It is true, the chancellor was authorized, by the manner of procedure in courts of equity, to make up issues of fact, called issues out of chancery, and refer them to a jury to enlighten his conscience; but the parties had no right to demand a trial of any issue in an equity case by a jury.

But it is insisted by counsel for appellant that courts of equity did not have jurisdiction at the time of the adoption of the constitution to abate any nuisance, except in cases where some property right was affected by the maintenance of the nuisance; and it is contended that the enlargement of the jurisdiction to that class of cases in which property rights are not involved, is an abridgment of the right of trial by jury. The jurisdiction of the cause of action "is the power over the subject-matter given by the laws of the sovereignty in which the tribunal exists." 1 Bouv. Law Dict., 769.

Let it be conceded that courts of equity, before the adoption of the constitution, declined to entertain actions of injunction to restrain and abate nuisances in cases where no property rights were involved. The legislative history of this state, and the jurisdiction entertained by its courts, do not warrant the conclusions that there is no legislative discretion in regard to what controversies shall be of equitable cognizance. Since the adoption of the constitution, a jury has been allowed in actions for divorce, and this right has been taken away. So in case of the foreclosure of mortgages and mechanics' liens. We are not, then, required to examine the laws in force at the time the constitution was adopted, and hold that in every case which was then triable by a jury the right to such trial remains inviolate. Such a construction of the constitutional provision involves too narrow a view of legislative power. It being conceded that equity had jurisdiction in cases of nuisance, we can see no invasion of the rights of the citizen by an act of the legislature extending it to cases where no distinct property right is involved;

and we may say here that the distinction sought to be made between nuisances where property rights are involved and where they are not, is very limited, narrow, and ill defined.

Courts constantly enjoin nuisances where no damages can be estimated in money, and where the nuisance produces mere annoyance and discomfort to the complaining party; as a manufacture producing discomfort to individuals; (*Catlin v. Valentine*, 9 Paige, Ch., 575;) a blacksmith-shop near plaintiff's dwelling; (*Faucher v. Grass*, 60 Iowa, 505;) a livery-stable; (*Shiras v. Olinger*, 50 Iowa, 571;) a hog lot; (*Richards v. Holt*, 61 Iowa, 529.) These, and many other cases which might be cited, show a very great relaxation of the old rule that no action will lie to restrain and abate a public or common nuisance, unless the plaintiff, in the language of Blackstone, "suffers some extraordinary damage beyond the rest of the king's subjects by a public nuisance, in which case he shall have private satisfaction by action; as if, by means of a ditch dug across a public highway, which is a common nuisance, a man or his horse suffer any injury by falling therein, for this particular damage, which is not common to others, the party shall have his action."

It is not easy to perceive why the law-making power may not authorize the suppression of the saloon nuisance by injunction because no property rights are involved. It was always allowable to enjoin the obstruction of a public highway, or a navigable stream, by an action in equity at the suit of the public. This was done because it was claimed that a property right in the public was involved; and such proceedings were authorized without the aid of any statute. Such nuisances are detrimental to the public, because they obstruct travel and impede navigation. But the damages to the public are no more susceptible of computation than the injuries to the public by the unlawful maintenance of a saloon. In *State v. Iron Cliffs Co.*, 54 Mich., 350, in discussing the power of the legislature under this provision of the constitution, it is said that "its power to create and enlarge

equitable jurisdiction is not only undoubted, but unlimited." Without further dwelling upon this branch of the case, we conclude that the statute in question, so far as it authorizes the action, is not repugnant to the constitution.

II. It is further insisted that the action in equity authorized by the statute cannot be maintained, because the legislature has no power to enforce a criminal law by a civil action. But "one maintaining a nuisance may not only be punished in a criminal proceeding, but a civil action at law to recover damages in a proper case, and an action in equity to restrain the nuisance, may be prosecuted against him. *Richards v. Holt*, 61 Iowa, 529; *Ewell v. Greenwood*, 26 Id., 377. These cases were decided without any reference to a statute expressly authorizing an action in equity, in addition to criminal punishment. It ought not to be claimed that a statute is unconstitutional which merely provides a remedy which was available without the statute. And it must be remembered that the defendant is not convicted and punished for a crime by the injunction. It belongs to that class of remedies which may properly be provided by statute to aid in the administration of preventive justice. It stays the arm of the wrong-doer. It does not seek to punish him for any past violations of the law. Its purpose is to prevent a public offense, and suppress what the law declares to be a nuisance. The denial of a trial by jury is not as oppressive to the party charged, as the statute requiring a person who threatens to commit a public offense to give bonds with sureties to keep the peace towards the people of the state, and, in default of giving the bond, committing him to prison. Code, §§ 4115-4119. So far as we are advised, no one has ever claimed that the law requiring security to keep the peace was a denial of the right of trial by jury.

The defendant, in order to succeed in the defense that the proceeding by injunction is an attempt to enforce a criminal law by civil process, demands, in effect, that the courts must

THE SAME:
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establish the principle that, because the nuisance complained of is a crime, it is entitled to favor and protection in a court of equity. Such rule would not command the respect or approval of any one.

There are many adjudged cases, aside from those above cited, which expressly hold that the fact that a nuisance is a crime, and punishable as such, does not deprive equity of its jurisdiction to restrain and abate it by injunction. *People v. City of St. Louis*, 5 Gillman, (Ill.,) 351; *Attorney-general v. Railroad Co.*, 3 Greene, (N. J.,) Eq., 136; *Attorney-general v. Hunter*, 1 Dev. Eq., 12; *Minke v. Hopeman*, 87 Ill., 450. And this rule applies to actions by private individuals, and to suits for the benefit and in behalf of the public.

III. It is further claimed that the statute is invalid because it authorizes an action to be brought by any citizen of the county, without a showing that he is especially damaged by the nuisance. What we have said with reference to the power of the legislature to enlarge the jurisdiction of a court of equity will apply with the same force to this objection. It is surely within the power of the legislature to designate the persons at whose suit a nuisance may be enjoined and abated. The reason of the rule which formerly obtained, that a private action will not lie for a public nuisance without special damages, was that to authorize private actions would create a multiplicity of suits, one being as well entitled to bring an action as another. *South Carolina R'y Co. v. Moore*, 28 Ga., 418. But because the enforcement of a statute may create a multiplicity of actions is no ground for declaring it unconstitutional. Questions of policy or expediency in legislation are for the law-making power itself, and courts have no authority to interpose their judgment against that of the legislature, upon the ground that the law in question may be inexpedient, or that some other enactment would better serve to accomplish the desired object.

THE SAME:
special dam-
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iff.

But there is another view of this question which must not

be overlooked. There can be no doubt that it is within the power of the legislature to designate the person or class of persons who may maintain actions to restrain and abate public nuisances, and when that is done the action is for all purposes an action instituted in behalf of the public, the same as though brought by the attorney general or public prosecutor. We are strongly inclined to think that in this case a decree for the defendant would be a bar to any other like action for an injunction, upon evidence of sales of liquor within the same time as is embraced in this action. The plaintiff is by law made the representative of the public in bringing and maintaining the action.

IV. Lastly, it is claimed that there is no authority for the issuance of a temporary injunction, and that there can be no injunction until after a conviction for unlawful sales of intoxicating liquors. We have already said that the action in equity is independent of criminal prosecutions, and it is wholly immaterial whether the defendant has been convicted or not. We think the temporary injunction was properly allowed. Section 3391 of the Code, by plain implication, authorizes a temporary injunction in actions to restrain a nuisance. This is an action for an injunction only. No damages are claimed, and no other relief is demanded. The law denounces the unlawful maintenance of a saloon or dram-shop as a nuisance. The plaintiff, in his own behalf and in behalf of other citizens, demands that the defendant cease from pursuing his unlawful and criminal occupation, and he prays that a temporary injunction be allowed. It plainly appears from the petition that the defendant, when the petition was presented to the judge, was and had been a defiant, persistent and open violator of the law. In view of these facts, the showing made for the issuance of the temporary writ was sufficient, under section 3388 of the Code. The law having denounced the defendant's calling and occupation as a nuisance, in the judgment of the law he was every day doing acts which produced great and irrepar-

THE SAME:
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tion.

able injury to the plaintiff and other citizens; injuries, that in the judgment of the legislature, ought to be enjoined and prevented by an action in equity. No earthly power is able to repair the injury which may be done by the maintenance of the nuisance from the commencement of the action until the final decree, and for that reason a temporary injunction is authorized by the law.

We have disposed of every question made by counsel in the case. We have pursued a different order in the discussion of the case from that adopted by counsel, and have not reviewed nor commented upon all the authorities cited; but we think we have fairly disposed of every question presented. The case has been exhaustively and ably argued, orally and in print, and we have given it our most careful consideration; and keeping in view that important and oft-repeated rule, that no court is authorized to declare an act of the legislature invalid unless it is plainly, palpably and beyond doubt repugnant to some provision of the constitution, we reach the conclusion that the court below did not err in entertaining the action and in granting the temporary injunction.

AFFIRMED.

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THE CENTRAL IOWA R'Y CO. V. PIERSOL ET AL.

1. **Justices' Court: JUDGMENT BY DEFAULT RENDERED OUT OF TIME: IRREGULAR BUT NOT VOID: REMEDY: INJUNCTION.** A cause was regularly commenced in justice's court by service of notice on defendant, and was set for 9 o'clock, A. M. Plaintiff appeared soon after 9 o'clock, and before 10 o'clock, defendant not having appeared, the justice stated that, as there was no appearance for defendant, he would enter judgment for plaintiff by default on the itemized and verified account sued on; and he began to make the entry, but, desiring to leave town, he closed his docket, without completing the entry, stating that he would do what further was necessary on his return in the afternoon. Before 10 o'clock the defendant appeared, examined the docket, found no judgment entered and the justice gone, and after 10 o'clock he departed, and gave the case no further attention. At 3 o'clock P. M. of the same day the justice returned and completed the judgment entry. Execution was issued, and this action was to enjoin its enforcement. *Held* that the judgment was irregular, but not void, and that the remedy was by appeal or writ of error, and that injunction would not lie to restrain the enforcement of the judgment.

ADAMS, J., *dissenting*.

Appeal from Cerro Gordo Circuit Court.

MONDAY, MARCH 17.

DEFENDANT, Piersol, is a justice of the peace. He entered a judgment against plaintiff in favor of defendant, J. J. Clough, and an execution was issued thereon and placed in the hands of defendant, G. M. Strong, who is constable. Plaintiff brought this action to enjoin the enforcement of said judgment. A temporary injunction was allowed by the judge of the circuit court in vacation, but on the final hearing of the cause this order was vacated, and plaintiff's petition was dismissed. Plaintiff appeals.

H. E. J. Boardman, J. H. Blair and A. C. Daly, for appellant.

Cliggett, Miller & Cliggett and P. G. Dougherty, for appellees.

REED, J.—The judgment sought to be enjoined was rendered in an ordinary action on a money demand. The action was regularly commenced by the service of notice on the defendant. The case was set for trial at 9 o'clock A. M., on the eighteenth of June, 1881. The plaintiff in the action and his attorney appeared at the office of the justice before whom it was pending, at 9 o'clock, or soon thereafter. The cause was called at some time between 9 and 10 o'clock, and the justice stated to the plaintiff's attorney that, as there was no appearance for defendant, he would enter judgment for plaintiff by default. The action was on an account, an itemized statement of which, duly verified, was filed with the justice, so that, in case the defendant made default, it would be unnecessary for the plaintiff to introduce any evidence to establish his claim. The justice opened his docket for the purpose of making the necessary entry therein, but, as he was desirous of going to a neighboring town that morning by the train, and as he heard the train coming before he completed the entry, he closed the docket, stating to the attorney that he would do whatever else was necessary to be done in the case after he returned in the afternoon.

There is some conflict in the evidence on the question as to whether the default was entered of record before the justice left his office; but we think a preponderance of the evidence shows that it was not entered at that time. The justice left his office at 9 o'clock and 50 minutes, and between that time and 10 o'clock an attorney for the defendant in the action appeared at the office for the purpose of appearing in the action for the defendant, and making defense therein. He examined the justice's docket, and, finding that no judgment had been entered against his client, and not finding the justice at his office, he left the office after 10 o'clock, and gave the case no further attention on that day. The justice returned to his office at 3 o'clock in the afternoon, and then completed the judgment entry in his docket. The attorney for the defendant did not learn that the judgment had been

entered until the twenty-seventh of June. He then wrote to the justice, complaining of his action, and insisting that the judgment was void, and threatening to institute a personal action against him for damages unless the judgment was canceled. After some further correspondence between the parties, the justice, on the eighth of July, entered on the record of the judgment an order to the effect that it was canceled by request of the defendant, on the claim that the judgment was void, because rendered by default before the expiration of the time within which defendant had the right to appear and defend.

The ground upon which plaintiff seeks to enjoin said judgment is that, as it was entitled to appear in the case and make its defense at any time before 10 o'clock on the appearance day, and as it did appear at the office of the justice within that time for the purpose of making its defense, and was only prevented from doing so by the absence of the justice, he ceased to have jurisdiction of it, and the judgment which he subsequently entered is void for that reason. We think, however, that the position is not tenable. The action, as we have seen, was regularly commenced. The justice had jurisdiction of the case and of the parties. If he had entered the judgment in his docket before 10 o'clock, his action would have been erroneous, but the judgment would not have been void. *Cory v. King*, 49 Iowa, 365. In doing so, he would have been acting within his jurisdiction, but erroneously, and, under the well-settled rule in this state, the error could be corrected only in a direct proceeding, such as appeal or writ of error. *Cooper v. Sunderland*, 3 Iowa, 114; *Morrow v. Weed*, 4 Id., 77; *Dishon v. Smith*, 10 Id., 212; *Ryan v. Varga*, 37 Id., 78. It is probably true that no rights of the parties were determined by the oral statement of the justice, before he left his office, that he would enter judgment for plaintiff by default. Defendant had the right, notwithstanding that statement, to make its defense, and plaintiff gained no advantage from it. But what was done at that time had the effect

to postpone the trial of the cause until 3 o'clock. The justice had the power to adjourn the cause, but probably not on the ground on which he did adjourn it. Code, § 3527. His action in adjourning it was irregular and erroneous, but was not void. He did not lose jurisdiction of either the parties or the cause by adjourning it. But the cause was still pending, and he had jurisdiction of the parties when he entered the judgment. The most that can be said, then, is that the judgment was erroneous. But plaintiff has no remedy by injunction on that ground. The judgment of the circuit court is, therefore,

AFFIRMED.

ADAMS, J., *dissenting*.—Section 3525 of the Code provides that “the parties in all cases are entitled to one hour in which to appear after the time fixed for appearance, and neither party is bound to wait for the other.” The railway company, the defendant in the action before the justice, appeared within the time allowed, and waited until the expiration of the hour. By express provision it was not bound to wait longer, yet, according to the majority opinion, as I understand it, the company was bound to wait indefinitely, or suffer a default. If a defendant can be required to assume that a case, not expressly postponed nor adjourned, neither plaintiff nor justice being present at the time set, nor during the hour, is liable to be called for hearing afterwards during the day, he must assume, so far as I can see, that it is liable to be called for hearing at any time thereafter. That a justice should be allowed to abandon his office for weeks or months, and return at his pleasure and proceed at once to call for hearing all the cases on his docket, is to my mind without reason or warrant.

It may be that a justice is not without jurisdiction to render a judgment in *advance* of the time set. But such case is different from the one in question. After the time set, and the expiration of the hour during which the defendant is

Crystal v. The City of Des Moines.

bound to wait, no appearance being made by the plaintiff, nor express postponement nor adjournment being made, I think that the defendant has a right to assume that the case has been abandoned, and govern himself accordingly. The case to my mind is not different from what it would be if the plaintiff had appeared and directed an order of dismissal to be entered. The defendant might assume that it would be entered, and govern himself accordingly. Such direction would stand for a dismissal, and the justice be deemed to be without jurisdiction to do more than enter the order. An abandonment of a case under circumstances like those shown should not be deemed to have less force than a direction by the plaintiff to dismiss. I think that the justice lost jurisdiction, and that the plaintiff was entitled to an injunction as prayed.

CRYSTAL V. THE CITY OF DES MOINES.

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1. **Practice in Supreme Court: EVIDENCE TO SUPPORT VERDICT.** This court cannot consider whether a verdict is or is not supported by the evidence when the abstract does not contain all the evidence.
 2. **Cities and Towns: DUTY AS TO STREETS: INJURY TO TRAVELER FROM EXCAVATION: EVIDENCE.** Where a city street has been open for travel its entire width, the city must keep it in a reasonably safe condition from sidewalk to sidewalk, and cannot excuse itself for leaving an unguarded excavation in such street by showing that there was as a matter of fact no travel thereon.

Appeal from Polk Circuit Court.

WEDNESDAY, MARCH 18.

ACTION to recover for personal injuries sustained by plaintiff by reason of an excavation made by defendant in one of its streets, into which he drove his carriage and team in the night-time. There was a judgment upon a verdict for plaintiff. Defendant appeals.

Williamson & Kavanagh, for appellant.

B. A. Williams and *C. C. Cole*, for appellee.

BECK, CH. J.—We shall dispose of the objections to the judgment in the order of their presentation in appellant's argument.

I. It is first insisted that the verdict lacks support of the evidence; but the abstract does not show that it contains all of the evidence. On the contrary, it affirmatively appears that it does not. Under familiar rules prevailing here, we cannot consider this objection.

II. The excavation into which plaintiff drove, causing his injury, was made in the street by the city, for the purpose of putting in a "catch-basin" connected with the sewer. The excavation, it is claimed, was left without sufficient barriers to prevent teams from being driven into it, and without signal lights. The defendant claimed that it was not in the traveled part of the street. To support this claim, it asked a witness whether he had "recently looked at the ground to see if there were indications of travel on the east side of the 'catch-basin';" and also whether there are any indications of any travel at any time; whether the ground shows there was ever any travel by teams." The witness was not permitted to answer the question.

The accident occurred some months before the trial; and it was not made to appear that a recent examination of the street and its present appearance would reveal the fact that travel of the street did not, at the time of the accident, pass over the spot where the excavation was made. It was not shown that the street was not open for travel its entire width. If so open, the city was bound to keep it in a reasonably safe condition from sidewalk to sidewalk. *Stafford v. City of Oska-loosa*, 57 Iowa, 748. It cannot be presumed that it was so

opened. If it was, the city could not, by excavation, temporarily withdraw it from public use, without using proper precaution to prevent travelers in the night-time driving therein. If it had been open to public use for its whole width, it is immaterial whether there was or was not indications of its use to that extent. The evidence was rightly rejected.

III. The court gave certain instructions as to the care to be exercised by the city over its streets, and the precaution to be taken by it to protect travelers passing upon its streets, in which excavations or obstructions are permitted by the city. The rules of the instructions are complained of upon the ground that they are inapplicable to the facts of the case. The position of defendant's counsel in support of this claim of the inapplicability of the instructions is, that the city had a right to erect the "catch-basin," and is not liable, if there was no negligence in leaving it in the condition in which it was when plaintiff drove into it. This may be conceded to be correct. But the instructions given are not at all in conflict with the position. They, however, present correct rules to guide the jury in determining whether plaintiff did exercise proper care. These rules counsel for defendant do not question.

IV. The instructions asked by the defendant and refused, present the thought that the city may use the streets for sewers, and attachments thereto, leaving a sufficient space for travel. This may be correct; but it does not meet the case, which is to recover of the city for negligence in not sufficiently protecting travelers from the dangers of the excavation. These instructions were correctly refused.

The case presents no other questions. The judgment must be

AFFIRMED.

MOORE V. THE CHICAGO, BURLINGTON & QUINCY R'Y CO.

1. **Evidence:** OPINIONS AS TO ABILITY TO PERFORM DUTIES OF BAGGAGE-MAN AND EXPRESS MESSENGER. The opinion of witnesses familiar with the duties of baggage-men and express messengers on a certain route on a railroad, and who had seen plaintiff try to perform those duties, were not admissible to prove his incompetency to perform those duties. No question of science or skill was involved, and it was for the jury, after hearing all the facts, to decide as to plaintiff's competency; following cases cited in opinion.
2. **Railroads:** INJURY TO EMPLOYEE: SETTLEMENT BY AGREEMENT TO HIRE EMPLOYEE AS BAGGAGE-MAN AND EXPRESS MESSENGER: DUTY OF COMPANY. Plaintiff was injured on defendant's road, and, in settlement of a suit growing thereout, defendant agreed to employ him as baggage-man and express messenger at certain monthly wages. Plaintiff now sues for a breach of that contract, and defendant answers that he was not competent to perform the duties of such employment. *Held* that defendant was bound to afford plaintiff a fair opportunity to acquire the necessary knowledge and skill in the manner in which they are ordinarily acquired by men in that service.
3. ———: ———: ———: WRONGFUL DISCHARGE. In such case, if defendant, after plaintiff had entered into its service under the contract, wrongfully discharged him, this was as certainly a refusal by it to furnish him the employment agreed upon as its refusal to permit him to enter its service would have been.
4. ———: ———: ———: RIGHT TO DISCHARGE FOR INCOMPETENCY. In such case, if plaintiff, after entering upon the service agreed upon, was found, after a fair trial, to be incompetent for want of qualification mentally, or if he proved to be too weak or infirm bodily, or was too slow, and could not discharge his duties in proper time, then the defendant might rightfully discharge him, and would not be liable therefor.
5. **Practice on Appeal:** CONFLICTING EVIDENCE TO SUPPORT VERDICT. The evidence being in conflict, this court cannot, under the well established rule, set aside the verdict as not being supported by the evidence.

Appeal from Monroe Circuit Court.

WEDNESDAY, MARCH 18.

It is alleged in the petition that in March, 1881, a suit was pending in one of the courts of Monroe county between plaintiff and defendant, in which plaintiff sought to recover

of defendant damages for personal injuries which he had sustained while in defendant's employ; and that the parties entered into a contract for the settlement of plaintiff's claim; and that, among other things given by defendant in said settlement, was a written undertaking by it to employ plaintiff as a baggage and express man whenever he was able to go to work, and to give him steady employment in such position, and to pay him the wages usually paid for such services, which were \$60 per month; and that in December, 1882, plaintiff notified defendant that he would be ready and able to go to work as baggage and express man on the first of January, 1883, and that he has at all times since that date been ready, able and willing to enter upon said services and perform the duties of said employment, but that defendant refused and failed to give him employment therein; and that, by reason of this failure and refusal, plaintiff was out of employment from January 1 to September 1, 1883; and for the value of his services under said contract during that time plaintiff asks judgment.

Defendant in its answer admitted the making of the contract as alleged in the petition, but denied that it refused plaintiff employment under said contract; but alleges that it employed him on one of its railroads as baggage-man and expressman, and that he remained in said employment but a short time, when he voluntarily left said employment and ceased to work therein. It also alleged that plaintiff was not qualified nor able to perform the duties required of a baggage and express man on its road; and that he was not competent to discharge said duties. The verdict and judgment was for plaintiff, and defendant appeals.

T. B. Perry, for appellant.

J. E. Townsend and *John F. Lacey*, for appellee.

REED, J.—The evidence given on the trial shows that plaintiff informed defendant in the month of December,

1882, and at other times between that and the first of the following July, that he was able to go to work as express messenger and baggage-man, and that he desired to be employed in that capacity under the contract between the parties. Shortly before the first of July he was directed by one of defendant's agents to hold himself in readiness to go to work, and on the second of that month he was directed to take charge of the baggage and express business on defendant's road from Albia to Des Moines. The baggage and express matter are carried on that route in the same car, but the express business is conducted by the American Express Company. The train on which plaintiff went to work makes one trip daily from Albia to Des Moines and return. On the trip on July second, a route agent of the express company, also another employe of the company, accompanied plaintiff, riding with him in the express and baggage car, and rendered some assistance in handling the baggage and express matter, and the route agent gave plaintiff some directions as to the proper manner of doing the work and transacting the business. The route agent also accompanied plaintiff on the trip the next day. But when they arrived at Des Moines plaintiff quit the work. Whether he quit voluntarily, or was discharged by the route agent, is in dispute between the parties. But the jury found that he was discharged, and the verdict in this respect finds sufficient support in the evidence.

It frequently happens that single pieces of baggage, weighing as much as two hundred and fifty pounds, are carried on the car, and the express business done on the line is quite extensive. The handling of the baggage requires the exercise of a good deal of physical strength; and a good deal of dispatch is required in the transaction of the express business to avoid delaying the train unduly at the different stations. The express messenger is also required to make duplicate way-bills of such express matter as is received at certain stations on the line, and to enter them upon his delivery book. This writing must be done while the train is in motion; and, as

these bills and entries constitute the company's record of the business, it is important that the writing should be legible.

It was claimed by defendant that plaintiff did not possess the physical strength requisite for the handling of the baggage; and that he possessed neither the skill nor activity required in the proper transaction of the express business; and that he could not write a legible hand.

The route agent and the other employe of the express company, who accompanied plaintiff on the second of July, were

J. EVIDENCE : examined as witnesses on defendant's behalf. It
opinions as to ability to per- was shown that they each had had long experience as
form duties of express messengers and baggage-men on railroads,
baggage-man and express and that they were well acquainted with the
messenger. amount and character of the business done on the route from
Albia to Des Moines. Defendant asked these witnesses a
number of questions, with the view of eliciting their opin-
ions as to the ability and capacity of plaintiff to perform the
duties of baggage-man and express messenger. They were
asked whether, in their opinion, he possessed the qualifica-
tions and capacity and fitness to discharge the duties devolv-
ing on an express messenger and baggage-man, and whether,
in their opinion, he possessed sufficient physical strength to
handle the amount of baggage which was carried on that route.
But these and other similar questions were excluded by the
circuit court, on plaintiff's objection, on the ground that the
subject to which they related was one on which the mere
opinions of the witnesses were not competent evidence. This
ruling is assigned as error. In our opinion the ruling is
correct.

The questions related exclusively to plaintiff's fitness for the position of baggage-man and express messenger, and his capacity to perform the duties of that position. This, we think, was in no sense a question of science or skill, or one upon which inexperienced persons are incapable of forming a correct judgment without the aid of the opinions of experts. Nor is it one in which the facts, from which the judgment

or opinion must be formed, cannot be fully presented to the jury. The ground upon which it is claimed that the opinions of the witnesses should have been admitted is, that they were well acquainted with the amount and character of the business done on the route, and knew also the degree of skill and strength and activity which must be exercised in the proper performance of the labor, and they had also seen plaintiff in his attempt to perform the duties of the position; and consequently they were in a position to form a correct judgment as to his fitness and capacity to perform those duties. Under this claim, however, the opinion of the witnesses would be specially valuable, not because of any special study or examination which they had given the subject, but because they were in possession of all the facts which should be considered in forming a judgment or opinion on the subject. But these facts were all capable of being communicated to the jury; and the witnesses did state the amount and character of the express business done on the route, and the amount and weight of the baggage which the baggage-man was required to handle, and the time within which the work was required to be done, and the manner in which it should be done, and the other facts which should be considered in forming a judgment as to the strength and skill and activity which must be exercised in performing the duties. They also stated the facts with reference to the manner in which plaintiff did the work while they were with him, and which led them to conclude that he was not capable of properly performing the duties of the position.

As the question of plaintiff's fitness for the position was to be determined from these facts, it was clearly the province of the jury to determine it. It was for them, and not for the witnesses, to determine what conclusions or deductions should be drawn from the facts which were established. In excluding the evidence of the opinions of the witnesses, the circuit court followed the rule on the subject as heretofore laid down by this court. See *Muldowney v. Illinois Cent. R'y Co.*,

 Moore v. The Chicago, Burlington & Quincy R'y Co.

36 Iowa, 462; *Hamilton v. Des Moines Valley R. Co.*, Id., 31; *Belair v. Chicago & N. W. R. Co.*, 43 Id., 662.

II. The court instructed the jury that it was the duty of defendant, under the contract between the parties, "to afford plaintiff a reasonably fair opportunity to learn the business, and to discharge the duties of baggage and express man on its road, and that, if it discharged him from its service without affording him such opportunity, it was liable. But if it afforded him such opportunity to learn the business and discharge the duties of the position, and he was not able to discharge such duties with reasonable promptness and ability, and it discharged him for that reason, he could not recover." Defendant assigns the giving of this instruction as error. It is argued by counsel that under it defendant was required to take plaintiff into its employment and give him room in its baggage and express car while he was merely learning the duties of the position of baggage-man and express messenger; but we think this is not the meaning of the instruction. The character of the duties of the position is shown by the evidence. It is the duty of baggage and express men to receive and care for the baggage which is carried on the car, and deliver it at the station to which it is consigned, and to receive, care for and properly deliver the express matter which is carried on their route, and to make the necessary way-bills and entries in the book which they are required to keep. A good deal of the work performed by them in the discharge of the duties of the employment consists of mere manual labor; and no previous preparation is required to fit the messenger to perform it. There are other duties, however, which require business knowledge and capacity for their proper performance; but this knowledge the messenger is expected to acquire while in the actual performance of the duties. The business is not one to which men serve an apprenticeship; but intelligent, active men, possessing the requisite physical strength, may enter into it without

2. RAILROADS:
injury to em-
ployee: settle-
ment by
agreement to
hire employe
as baggage-
man and ex-
press messen-
ger: duty of
company.

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previous special preparation, and by attention to its duties they soon acquire the skill and knowledge required for their proper performance. The instruction in question means simply that defendant was bound to afford plaintiff a fair opportunity to acquire this knowledge and skill in the manner in which it is ordinarily acquired by men in that service; and we think it is correct.

III. Defendant also excepts to those portions of the instructions referred to which define the grounds upon which

3. —: —: defendant had the right to discharge plaintiff
wrongful discharge. from its service, for the reason that it is not applicable to the issue—the complaint in the petition being that it had wrongfully refused to take him into its service under the contract, and not that it wrongfully discharged him from that service. The allegation in the petition is “that the defendant has refused and failed to furnish him the employment agreed upon.” Under this allegation evidence was properly admitted tending to prove that defendant discharged plaintiff after he had entered its service under the contract. If it discharged him wrongfully, this was as certainly a refusal by it to furnish him the employment agreed upon as its refusal to permit him to enter its service under the contract would have been. The instruction, therefore, was applicable to the issue.

IV. Defendant asked the court to give the following instruction to the jury: “If plaintiff undertook to perform

4. —: —: the duties of expressman and baggage-man, the
right to discharge for incompetency. defendant had the right to require of him the performance of the duties required of the service in a reasonably fair and expeditious manner. If he found himself to be incompetent for want of qualification mentally; if he proved to be weak or infirm bodily, or was too slow, and could not discharge the duties in proper time,—the defendant was not bound to continue him in its service.” The court added the following to the instruction: “It is true that if plaintiff proved inefficient to discharge the duties

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of the position in question, after a fair trial, he cannot recover." And with this addition gave it to the jury. Defendant assigns as error the action of the court in modifying the instruction.

The instruction as asked by defendant is clearly right, and the proposition embodied in it is expressed with reasonable clearness, and the court might well have given it in the form in which it was asked; but no prejudice could result to defendant from the giving of the clause added by the court. The meaning of the instruction was not thereby changed; for the thought expressed in the clause added is substantially the same as that expressed in the original instruction.

V. It is finally insisted that the verdict is not supported by the evidence; but we cannot interfere with the judgment on this ground. There was conflict in the evidence on nearly all the disputed questions of fact in the case, and we cannot say that the jury were not justified in finding as they did on those questions.

5. PRACTICE
on appeal:
conflicting
evidence to
support ver-
dict.

The judgment of the circuit court must be

AFFIRMED.

 Stubbs v. The Clarinda, College Springs & Southwestern R'y Co.

 STUBBS V. THE CLARINDA, COLLEGE SPRINGS & SOUTH-WEST-
ERN R'Y CO. ET AL.

1. **Mechanic's Lien: SUB-CONTRACTOR: EXCESSIVE DEMAND: ACTION TO ENFORCE: DEMURRER.** Where plaintiff, a sub-contractor, filed a statement and claim for a mechanic's lien, and blended in his statement his account for moneys received and disbursed for his immediate employer with his account for labor performed by him, and then claimed a lien for the general balance, which was much greater than the balance actually due him for labor, and these facts were apparent upon the face of his statement, *held*, in an action to establish the lien, that a demurrer was properly sustained thereto, because the statement and claim filed was not a "just and true statement" as required by the statute, (Laws of 1876, Ch. 100, § 6,) and did not entitle plaintiff to a lien. Whether a mere mistake in claiming a lien for too large a sum would defeat the claimant, *quære*.

Appeal from Page District Court.

TUESDAY, MARCH 18.

ACTION to establish a mechanic's lien upon a railroad. The defendants demurred to the plaintiff's petition, and the demurrer was sustained; and, the plaintiff electing to stand upon his petition, judgment was rendered against him for costs. He appeals.

S. C. McPherrin, for appellant.

Hepburn & Thummel and *W. W. Morsman*, for appellees..

ADAMS, J.—The plaintiff averred, in substance, that in 1881 and 1882 the defendant, the Clarinda, College Springs & Southwestern Railroad Company, was engaged in building a railroad; that the company let the construction of a portion of it to one John Fitzgerald, and he sublet the work, or a portion of it, to Jesse Stubbs & Co., who employed the plaintiff as their book-keeper, cashier, and superintendent of their working force on the railroad; that as such employe he worked for Jesse Stubbs & Co. seven months, at an agreed salary of

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\$100 per month, commencing September 1, 1881, and ending March 31, 1882; that there is now due him for such work and labor the sum of \$547.33, for which he asks judgment, and the establishment of a mechanic's lien. He set out in his petition a copy of his statement for a mechanic's lien, which he avers he filed on the first day of April, 1882. This statement shows that on March 31, 1882, when the plaintiff's services ceased, he had received from his employers \$17,182.27, and had paid out for them \$17,029.60; that he credited in his own account with his employers the amount received from them, and charged to them the money paid out for them, and also charged his monthly salary at \$100 per month for seven months; and that the account thus kept showed a balance due him of \$547.33. His statement containing such account was sworn to, and showed that he claimed a mechanic's lien for the whole balance of account upon so much of the road as may be found in the county.

The defendants demurred generally. In argument they raise the question, among others, as to whether the filing of such a statement is a proper compliance with the statute. The provisions of the statute in relation to the statement necessary to be filed is in these words: "Every person, whether contractor or sub-contractor, who wishes to avail himself of the provisions of this statute, shall file with the clerk of the district court of the county in which the building, erection, or other improvement to be charged with the lien, is situated, a just and true statement or account of the demand due him, after allowing all credits, setting forth the time when such material was furnished or labor performed," etc. Code, § 2133. The demand referred to in the statute means, of course, the demand for which a lien is claimed. In the case at bar, the demand, as shown by the statement, was \$547.33, after allowing all credits. The defendants insist that this demand of \$547.33, for which a lien was claimed, was not "a just and true statement," as required by statute. In our opinion the defendants' position must be sustained. The balance act-

Stubbs v. The Clarinda, College Springs & Southwestern R'y Co.

nally due the plaintiff for labor, as we shall show, did not exceed \$200; the remainder of the balance was for money paid out, for which no mechanic's lien was allowable, as the plaintiff well knew. The items for money paid out were irrelevant to such an account, and could have been inserted only for the purpose of enabling the plaintiff to obtain a lien for what he was not entitled to. We do not say that a mechanic's lien should be denied in every case in which the statement filed shows a balance of account for material or labor larger than is actually due. Possibly, if there was no intention to claim for material or labor more than was due therefor, an error made in the claimant's favor would not be fatal to the lien. On this question we express no opinion. In the case before us, there was an intention to claim a lien for money paid out. The account was drawn with that device.

The object of the statute in requiring a just and true statement to be filed is manifest. The statement is designed to be notice to the world of the true claim of the material-man or laborer. It is especially designed to be notice to the owner of the real estate upon which the lien is claimed. It was designed, in this case, to warn the railroad company that, in order to protect itself, it must withhold from John Fitzgerald \$547.33 of the money otherwise payable to him; and it was designed to warn Fitzgerald that he must withhold a like amount from Jesse Stubbs & Co., the plaintiff's employers. If it were allowable to file an unjust and untrue statement, it can be seen at once that great injustice might be done. We think that the courts should hold the claimant to the strictest exercise of good faith in this respect.

We come now to consider whether it is true, as we have assumed, that the statement of the plaintiff's demand filed for a lien was unjust and untrue. We do not inquire whether the mere items of debit and credit are correct. We assume that they are; and on this assumption we propose to show that the "statement or account of the demand" for labor,

when taken as it was designed to be understood, is unjust and untrue. The statement sets up a claim for \$547.33, as the balance due for labor. We have stated that only \$200 was due for labor. A part, indeed, of the \$200 appears to have been due merely for book-keeping; but, in the view which we have taken of the case, it is not important to inquire whether this fact should be held to vitiate the statement. There was only \$200 due for labor of any kind.

This proposition the plaintiff denies, but the truth of it can be easily demonstrated. The first month's salary of \$100 became due October 1, 1881; the second, November 1; and the third December 1. Nothing had been paid the plaintiff prior to this time; but on the first day of December he received on account \$4,220; and again, on the thirty-first day of December, before another month's salary became due, he received \$4,252.31, and on the same day he paid out \$381.08. Before the first day of February, when the fifth month's salary became due, the plaintiff had received \$13,389.83. During the month of January, however, he had paid out \$3,854.46; but on the first day of February his receipts had exceeded his disbursements by \$9,153.28. This was sufficient to pay all salary earned to that time and leave in his hands \$8,653.28. During the month of February he received \$3,500, but his payments were very large. He paid out all the money in his hands belonging to his employers, and \$347.33 besides. The balance remaining due him is for this sum and two months' salary. We have assumed that the money received by him prior to February 1 in excess of disbursements was applicable upon his salary. Perhaps it would not be if it was received as a special trust fund, but it is not shown that it was. On the other hand, it is credited in the same general account in which the salary is charged, and the whole account is set out in the statement which was filed for a mechanic's lien. The plaintiff, by crediting the receipts in general account against his salary, must be understood as admitting that they were applicable upon his salary. The

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very account, then, which he sets out, shows that his salary for the first five months was paid, and that at the end of the five months there was a large balance against him. The statement filed for a lien should have embraced an account for labor merely. Such account might have been for the entire seven months' salary, but, as he had been paid for the first five months, there should have been a credit upon it of \$500. His disbursements, doubtless, were properly enough charged in his general account as it stood upon his books. That account concerned no one but him and his employers. But in his statement for a lien his disbursements had no proper place. They were entered there manifestly for the purpose of confusing and misleading, and giving color to the claim that there was \$547.33 due him for salary. The plaintiff was guilty of knowingly attempting to subject the property to an improper burden. The natural effect of his act was to improperly obstruct settlements and embarrass all the parties behind him.

Our attention is called to the case of *Foerder v. Wesner*, 56 Iowa, 159. In that case it was held that the plaintiff, who acted both as laborer and foreman in building a brick building, might have a lien for his labor where the only proof of the value of his services was of the value in gross; and it was said, in substance, that he might have a lien for his labor, even though a mere overseer could not. But that case differs, we think, materially from this. A foreman's labor is not susceptible of being properly divided into two divisions. What he does with his hands serves often, doubtless, as instruction. His diligence, too, may be presumed to promote the diligence of those under him; and his specific directions are probably often given while his hands are busy. It would be absurd to undertake to divide such labor. The case before us is one where the laborer has undertaken to mix the account for labor with an account for money paid for his employers, so as to give him a lien for both. The statement, being improper in this respect, cannot, we think, be deemed a compliance with

the statute. We think, therefore, that the demurrer was properly sustained.

We may add that the petition was assailed upon several other grounds, but as to them we do not, in the view which we have taken, have any occasion to express an opinion.

AFFIRMED.

CAMPBELL V. ORMSBY.

1. **Practice: ASKING INSTRUCTION IS WAIVER OF ERROR IN.** Where defendant, before the court instructed the jury, asked a certain instruction to be given, which the court did not give in that form, but gave another instruction to the same effect, *held* that defendant could not, on appeal, be heard to complain that such instruction was erroneous.
2. **Sale: EVIDENCE: ORDER OF PROOF: STATUTE OF FRAUDS: PRACTICE.** In an action on an oral contract of sale, it is competent to prove the contract, and afterwards to prove delivery under the contract. But where the subsequent testimony of plaintiff tended to show that there was neither payment nor delivery, such testimony was favorable to defendant, as tending to bring the case within the statute of frauds, and he cannot complain that a motion to strike it out was overruled. Such motion was not the proper method of applying the statute of frauds to the case.
3. —: **DELIVERY: QUESTION FOR JURY.** Whether there was a delivery in pursuance of the oral contract of sale in this case was properly submitted to the jury.

Appeal from Palo Alto Circuit Court.

TUESDAY, MARCH 18.

THE action was originally brought upon a promissory note. By an amendment to the petition, other causes of action were joined and declared upon by plaintiff. There was a verdict and judgment for plaintiff. Defendant appeals.

Soper, Crawford & Carr, for appellant.

T. W. Harrison, for appellee.

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103	619
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109	584
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116	488
65	518
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BECK, CH. J.—I. The petition, as amended, seeks to recover the balance due upon a promissory note executed by defendant; interest upon money advanced by plaintiff to buy stock, upon a written agreement between the parties for the prosecution of farming business as a co-partnership; for the refusal of defendant to furnish lumber and nails under that agreement, on account of which neglect and refusal the cattle of the partnership were without sufficient sheds, causing the loss of 10 of them; for taxes paid; and for a hay-fork. The defendant, in his answer, among other defenses, pleads that, by a written contract entered into between the parties, which was to take the place of the contract under which the partnership was formed, there was a full and complete accounting of all matters arising thereunder, and that plaintiff is barred from claiming to recover therefor. These contracts were introduced in evidence; and there was proof offered by plaintiff and admitted, tending to support the allegations of his petition in regard to the matters for which he seeks to recover in this action.

II. The circuit court in an instruction (the fifth) directed the jury that the last contract “purports to supplant and take the place” of the first; “and it is to be presumed that it was so intended to cover and did cover all the transactions between the parties arising under the contract” first made. “But such presumption may be overcome by evidence; and it is for the plaintiff to overcome such presumption in that way before he can recover for any of the items arising under the contract” first executed. This instruction is made the ground of objection to the judgment, the defendant claiming that the presumption referred to by the court is conclusive, and cannot be contradicted by proof. The position of counsel is that matters arising under the first contract were not for the consideration of the jury; a presumption, which is conclusive, arising upon the last contract, that they had all been settled. The correctness of the position cannot be the subject of inquiry, for the reason that, if the

1. PRACTICE:
asking in-
struction is
waiver of
error in.

instruction is incorrect, the error is waived by the defendant's asking the court to give an instruction holding substantially the same rule. That instruction is in this language: "If the jury find from the evidence that the contract entered into by the plaintiff and defendant * * * [the contract of settlement] was intended by the parties as a full and final settlement of all matters connected with their farming and cattle partnership, then the plaintiff cannot recover for the items of interest or money advanced by Campbell, nor for loss of stock which occurred during the continuance of the partnership business." This instruction was asked by defendant, as shown by the abstract, before the other instructions were given, together with another one holding that the last contract supersedes the first; but it does not convey the thought, by express language, that the presumption of the settlement of all matters growing out of the partnership is conclusive. The instructions asked clearly contemplate the rule that such presumption is not conclusive, and that it was for the jury to determine upon the evidence whether the parties intended a full settlement of all partnership matters. The instructions asked were refused by the court, for the reason, doubtless, that the rule they present was better expressed in the instruction given.

We have, upon this state of facts, the case of the defendant recognizing and insisting at the trial upon the very rule adopted by the court, and which is now complained of by him. But the law will not permit him to pursue this course. He cannot lead the court into an error by assenting to the doctrine of an instruction in which the error is found, and in this court seek to reverse the judgment on the ground of the error. *Smith v. Sioux City & Pacific R'y Co.*, 38 Iowa, 173; *Weller v. Hawes*, 49 Id., 45.

III. Touching the hay-fork, for which recovery is sought in the petition, plaintiff in his examination in chief testified

as follows: "As to the hay-fork and derrick, when he (defendant) came down to buy the cattle, he said he would take it off my hands at \$18,

2. SALE: evidence: order of proof: statute of frauds: practice.

what it cost. He did not pay for it. He refused to take it." Upon his cross-examination he testified as follows: "He (defendant) said he would take the hay-fork and the derrick to his farm in O'Brien county; he did not take it; he never paid anything on it." Thereupon the abstract shows that "defendant moves to strike out all the evidence of witness as to the hay-fork and derrick, it appearing that there was no delivery of the property and no amount paid. Motion overruled, defendant excepts." Plaintiff further testifies that "at the time of the talk of the derrick it was on the farm. I think the fork was there, but am not certain. I had ordered it, anyway; and he was to take it." The objection to the evidence was upon the ground that, as there was no evidence of either payment for or of delivery of the fork and derrick, the sale could not, under the statute of frauds, be shown by oral evidence.

The evidence objected to shows a contract of sale; but defendant claims that it also shows that there was neither payment nor delivery. The motion was directed against all of the evidence, both that which shows the oral contract of sale, and the non-payment and non-delivery. That part of the evidence which shows non-payment and non-delivery is favorable to defendant; for upon it he bases his position that the transaction is within the statute of frauds. He surely cannot complain on the ground that it was not stricken out. The part of the evidence showing the oral contract of sale was properly permitted to stand, for the reason that plaintiff was authorized to show a subsequent delivery pursuant to the sale, by evidence to be afterwards offered. Parties are not restricted as to the order of the introduction of their evidence. Plaintiff could first show an oral contract of sale, and follow it at any time during the trial, when, under the rules of practice, he was authorized to introduce proof, by evidence of delivery made pursuant to the sale. In the exercise of this right, plaintiff testified that he left the fork upon the farm. It ought to be here observed that the farm cultivated

The State v. McCartney.

under the partnership contract belonged to defendant, and that plaintiff, after the second contract, removed from it. It was for the jury to say, upon all the evidence, whether the fork was delivered to defendant pursuant to the sale testified to by plaintiff. Defendant should have asked for proper instructions upon this point of the case. Having omitted to do so, he cannot complain of results. He surely pursued an improper course in attempting to apply the statute of frauds to the case by his motion to exclude the evidence referred to above. It was correctly overruled.

The foregoing discussion disposes of all questions considered by defendant's counsel in their argument. Other questions raised by the assignments of errors are not discussed. We cannot therefore pass upon them. It is our opinion that the judgment of the circuit court ought to be

AFFIRMED.

THE STATE v. McCARTNEY.

1. **Practice:** ARGUMENT TO JURY NOT WARRANTED BY EVIDENCE: INSTRUCTION TO OBIVATE PREJUDICE. Ordinarily, the refusal to give instructions asked, which are merely in the nature of an answer to arguments of counsel on the other side, is to be commended; but in this case, (for facts see opinion,) the argument complained of had no warrant in the evidence, and was so calculated to prejudice the appellee that an instruction asked by him to obviate the prejudice should have been given.

Appeal from Delaware District Court.

WEDNESDAY, MARCH 18.

THIS is a proceeding to charge defendant with the support of a bastard child, of which he is alleged to be the father. There was a judgment for the state upon a verdict of a jury. Defendant appeals.

Herrick & Doxsee, for appellant.

J. H. Shields and *Calvin Yoran*, for appellee.

ROTHBROOK, J.—It appears from the evidence in the case that the child in question is the second bastard child of which the complaining witness is the mother. The whole record of the case, including her own testimony, shows that she has for years been of unchaste character. If her own account of the time, place and circumstances of the alleged illicit intercourse between her and the defendant be true, she is an utterly abandoned and shameless woman. It appears that in September, 1882, she was making her home with one Nicholas McCartney, the father of the defendant. Nicholas McCartney and his wife, both of whom are advanced in years, left their home in charge of the complaining witness for about a month, while they were absent on a visit. The defendant is married, and resides with his wife and three children in a house on the farm, some distance from the house of his father. It was during this absence of the father and mother of the defendant that the complaining witness became pregnant. The evidence shows that two young men, who were at work on the farm, and who boarded and lodged at the house of the defendant, made daily visits to the house where the complaining witness staid, and one of them testified that on one occasion he had sexual intercourse with her in a public road in the neighborhood. The mother of the defendant testified upon the trial that after her return, and when it became known that complainant was pregnant, complainant stated to her that one Parrott was the father of the child. The evidence tends to show that Parrott visited complainant at the house during the absence of defendant's father and mother. The appellee called said Parrott as a witness in rebuttal, and he was asked the question whether he, during the month of September, 1882, or at any other time, had had sexual intercourse with complainant. He refused to answer

the question, upon the ground that he would not criminate himself.

In the argument to the jury, counsel for the state insisted that the evidence showed, and the jury were warranted in believing from the evidence, that Parrott was induced and procured by the defendant or his friends to refuse to answer the question on the ground above stated, and that he had been procured by defendant or his friends to state to counsel for the plaintiff that he never had sexual intercourse with complainant, for the purpose of inducing the plaintiff to put him on the stand as a witness. There was no evidence in the case tending to show that the defendant, or his counsel, or any of his friends, either directly or indirectly approached the witness Parrott, nor that they had any knowledge as to what his testimony would be. On the contrary, the evidence affirmatively shows that the defendant was innocent of any such interference or procurement. The argument of counsel was, therefore, outside the case as made by the evidence. Whether it was so flagrant a departure from a legitimate and proper presentation of the case to the jury as to warrant a reversal upon that ground, we do not determine. The defendant requested the court to instruct the jury upon this question as follows: "(4) Counsel for plaintiff have argued before the jury that the witness Parrott has been employed or induced by defendant to go upon the stand ostensibly as a witness for plaintiff, for the purpose of inducing plaintiff's counsel to ask him the question whether he had had connection with Theresa Reilley, and that, by the connivance of the defendant, or his friends, said Parrott was induced to refuse to answer said question. Now, on this matter, you are instructed that there is no evidence whatever in any manner tending to show that the defendant had anything to do with the testimony of said witness, and you are instructed that, in the absence of such evidence, you cannot find nor conclude that defendant is responsible for the testimony or conduct of said witness."

The court refused to give the instruction, and defendant insists that this ruling was erroneous. We think the instruction should have been given. The practice of arguing a case over again, in instructions requested to be given to the jury, is not good practice, and, ordinarily, the refusal to give instructions, which are merely in the nature of an answer to arguments of counsel on the other side, is to be commended. But in this case the argument complained of had no warrant in the evidence, and the recital we have given of the facts in the case, and many other undisputed facts, which might be cited from the record, including the contradictory statements of the complainant while testifying as a witness in the case, lead us to the conclusion that the instruction should have been given, and that the refusal to give it was prejudicial to the defendant.

REVERSED.

SPERRY V. KRETCHNER ET AL.

1. **Board of Supervisors: AWARDING PRINTING TO NEWSPAPERS: IRREGULARITY: INJUNCTION.** A board of supervisors has power to award the printing required under § 307 of the Code to the two newspapers having the largest circulation in the county, at 33½ cents per square, and to designate two newspapers to do the printing required by § 304, at a rate not exceeding \$1.00 per square. But where all the said printing was awarded to the two newspapers having the largest circulation, at 33½ cents per square, and to two other newspapers, at 29 2-9 cents per square, *held* that the action was, at most, irregular, and that, since the whole expense so incurred was less than the board was authorized to pay for such printing, a tax-payer had no ground on which to maintain an action to enjoin the supervisors from carrying the award into effect.

Appeal from Montgomery Circuit Court.

WEDNESDAY, MARCH 18.

THE plaintiff, who is a tax-payer in Montgomery county, seeks by this action to enjoin the defendants, who are mem-

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129	248

65	525
137	183

bers of the board of supervisors of said county, from carrying out a certain contract or resolution of the board, by which certain printing was awarded to four newspapers within the county. An answer was filed, and there was a motion made to strike out certain parts of it, which motion was sustained. Defendants did not amend their answer, and they appeal.

W. S. Strawn, for appellant.

C. E. Richards, for appellee.

ROTHROCK, J.—At a former term of this court we dismissed the appeal, upon the ground that the amount in controversy, as shown by the pleadings, did not exceed \$100, and there was no certificate of the trial judge authorizing an appeal. A petition for rehearing was filed by appellant, and a re-examination of the case leads us to the conclusion that the pleadings do not affirmatively show that the amount in controversy does not exceed \$100, and that appellant is entitled to a determination of the appeal on its merits.

The following is a copy of the resolution of the board which gave rise to the controversy: "It appearing that the *Express* and *Record* have the largest circulation in the county, it is ordered that the publication of claims and proceedings be given to said papers at 36½ cents per square, under section 307 of the Code, that being their proposition; also that the proposition of the *Villisca Review* and *Stanton Call*, to publish proceedings and claims at 22 2-9 cents per square, be accepted." Section 304 of the Code requires the board to publish in at least one newspaper, if there be one in the county, a schedule of the receipts and expenditures of the county, and a statement of the treasurer's accounts at the last settlement. Section 307 requires the board to publish its proceedings, at the expense of the county, in two newspapers therein having the largest circulation in the county,

and that the cost of such publication shall not exceed one-third the rate allowed by law for legal advertisements.

These sections of the Code provide for different publications. *McBride v. Hardin Co.*, 58 Iowa, 223. Section 304 authorizes the publication of the receipts and expenditures, and a statement of the treasurer's accounts. The compensation for making these publications is not specially fixed by this section of the statute. *Haislett v. Howard Co.*, 58 Iowa, 377. But section 3832 provides that in all cases where publication of legal notices of any kind are required or allowed by law, the person or officer desiring such publication shall not be required to pay more than one dollar per square, etc. The compensation under section 307 would be $33\frac{1}{3}$ cents per square, or one-third the rate allowed for legal advertisements.

The board had the power to award the printing required under section 307 to the two newspapers having the largest circulation. This it did. It had also the power to designate two other newspapers to publish the receipts and expenditures required to be published by section 304, and allow a reasonable compensation therefor, not exceeding one dollar a square. By the resolution of which the plaintiff complains, the publications required by both sections of the statute were awarded to all of the papers named. But the answer shows very clearly that by the contract the expenditure of the money by the county was less than it would have been if the "proceedings of the board" had been published in two papers, and the "receipts and expenditures" in two other papers. This being the state of the case, it may well be inquired what standing a tax-payer can have in the courts to restrain the officers of the county in the performance of their duties, unless he can show that he is in some way prejudiced. This can only be made to appear by showing that the expenditures complained of are in excess of that authorized by law, and that he is thereby burdened with taxation in excess of what should be imposed upon him. Conceding that the board should have designated two papers to publish under

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one section, and two papers to publish under the other, the action of the board in this case is a mere irregularity, and, unless prejudicial to tax-payers, they have no right to complain.

We think the motion to strike out certain parts of the answer should have been overruled.

REVERSED.

65 528
117 152

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136 30

KUHNS V. THE CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.

1. **Tender:** WRITTEN OFFER TO PAY UNDER CODE, § 2105: OFFER MUST BE WITHOUT CONDITION. "An offer in writing to pay a particular sum of money is equivalent to the actual tender of the money." Code, § 2105. But this statute simply dispenses with the actual production of the money. In other respects the rule of the common law prevails, which requires that a tender, to be good, must be unconditional. And so, where defendant herein made a written offer, which was in effect: "I am willing to pay you the named sum to avoid litigation; it is not due you, but I am willing to pay," held not sufficient to make the offer equivalent to a tender.
2. **Evidence:** VALUE OF CATTLE: HERD BOOK. A printed herd book in which the cattle in question were registered, shown to be a standard authority among cattle-breeders, was competent evidence, under section 3653 of the Code, to show the breed and grade of the cattle.

Appeal from Linn Circuit Court.

WEDNESDAY, MARCH 18.

ACTION to recover double the value of three heifers which were killed by a train on the defendant's road at a place where the right to fence existed. The defendant pleaded a tender or offer in writing to pay a certain amount of money, and that the tender had been kept good by the payment of the money to the clerk. To this defense a demurrer was sustained, and on the trial there was a verdict and judgment for the plaintiff. The defendant appeals.

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John W. Cary, D. S. Wigge, and Shewan & McCarn, for appellant.

Herrick & Dozsee, for appellee.

SEEVERS, J.—I. The offer in writing to pay, or tender pleaded, is in these words:

“CHICAGO, MILWAUKEE & ST. PAUL RAILWAY—SPECIAL
AGENT’S OFFICE.

“MILWAUKEE, April 18, 1882.

“*Phillip Kuhns, Esq., Centre Junction, Iowa*: On the seventh inst, I wrote you, offering \$200 in settlement of your claim for three heifers killed March 3, to which I have received no reply, but am in receipt this morning of thirty-day notice served upon our agent at Monticello, claiming \$300 on account of above accident. On a review of the papers connected with the case, I think it possible that I have underestimated the stock in question, and to avoid litigation I am willing to allow you \$250, which I am confident represents the full value of the stock killed. In fact, it would have been very difficult for you to have sold these heifers at that figure in cash. We dislike litigation, knowing its cost to both parties. If you prefer to bring an action against the company rather than accept the above offer, although it may cost us somewhat more than the amount named, I shall have the satisfaction of knowing that you have received much less than the \$250, for you may be assured that we will fight the case bitterly. I do not say this as a threat, but, feeling that I have now made all possible efforts to compromise the claim on a fair basis, if you force a law suit upon us, we shall feel it incumbent upon us to make it as expensive for you as possible.”

It is provided by statute that “an offer in writing to pay a particular sum of money is equivalent to the actual tender of the money.” Code, § 2105. This statute simply dispen-

ses with a production or actual tender of the money. This is the only effect. In other respects the rule of common law prevails. *Shugart v. Pattee*, 37 Iowa, 422. To make a valid tender at common law, the money must be produced and tendered unconditionally. If it be in full of all demands, or on condition that a receipt be given, or if it be offered by way of boon, with a denial that any debt is due, it cannot be regarded as sufficient. 2 Greenl. Ev. § 605; *Wood v. Hitchcock*, 20 Wend., 47; *Latham v. Hartford*, 27 Kan., 249; *Richardson v. Boston Chemical Laboratory*, 9 Metc., 42; *Tompkins v. Batie*, 11 Neb., 147; *Elderkin v. Fellows*, 60 Wis., 339.

The offer to pay was simply made to avoid litigation, and is accompanied with a threat. No amount is admitted to be due, but a willingness to pay a specified sum is expressed. If the tender had been made by the production of the money, accompanied with the words contained in the writing, we are clearly of the opinion that it would not have been a good tender at common law. In substance, the offer was: I am willing to pay you the named sum to avoid litigation; it is not due you, but I am willing to pay. The demurrer was correctly sustained.

II. It is stated in the petition that the heifers killed were "full blood of the short-horn Durham breed, registered in the twenty-second volume of the Herd Book." The plaintiff sought to introduce a printed volume of what purported to be the Herd Book in evidence, and he showed that the heifers were registered in the book in question, and that it was received and regarded by persons engaged in breeding cattle as a standard authority. The mode or manner in which cattle are registered in the Herd Book is immaterial, if the book is regarded as a standard authority; that is to say, if persons engaged in breeding stock rely on the book as an authority in their business; and this, we understand, was shown. The book offered in evidence was a printed copy, and we think it was admissible under section 3653 of the Code. It may be

The State v. Specht.

regarded as an historical work of a particular subject; that is, of a particular breed of cattle. The instructions are correct, and the court did not err in admitting the evidence of certain persons as experts.

AFFIRMED.

THE STATE V. SPECHT.

- 1. Manslaughter:** EVIDENCE INSUFFICIENT. The evidence in this case being insufficient to connect defendant with the homicide, the judgment of conviction for manslaughter is reversed.

Appeal from Jones District Court.

WEDNESDAY, MARCH 18.

THE defendant, John Neiman, and John Hoyne were jointly indicted and charged with the crime of having murdered Henry Barrenger. The defendant was found guilty of manslaughter, and appeals.

J. W. Jamison, for appellant.

Smith McPherson, Attorney-general, for the State.

SEEVERS, J.—In October, 1883, there was a dance at the house of one Hoyne. The persons invited thereto were Germans, with the exception of the deceased and five others, who were Americans, and who went in a body to the dance without being invited. Sometime during the night, the deceased caused some disturbance in the house, because, possibly, he was somewhat intoxicated; and, as beer was to be readily obtained, it is probable that all the male persons present were somewhat under its influence, although there is no direct and positive evidence to this effect. Because of the disturbance, the deceased, with some force, owing to his

resistance, was removed from the house. When outside, he and defendant had a difficulty. They struck each other, and were both on the ground "scuffling." They were separated, and the deceased started, we judge, to leave the premises. The defendant and others followed him to a highway a short distance from the house. There is a bridge which forms a part of the highway, and a short distance north of it the deceased and the defendant had another difficulty, and possibly exchanged blows. They were separated. Up to this time the deceased had not been seriously injured, and, conceding that a crime had been committed, it was assault and battery only. After the deceased and the defendant were separated north of the bridge, the former passed over it, and Neiman followed him, and the fatal blow was struck by Neiman on the south side of the bridge. It satisfactorily appears from the evidence, without serious contradiction, that the defendant at no time was south of the bridge, or present when the fatal blow was struck. It will be conceded that the defendant and Neiman jointly assaulted the deceased near the house, and again in the highway north of the bridge, but such difficulties were ended without serious results; and, as we are satisfied from the evidence, Neiman, on his own motion, and without the aid or advice of the defendant, followed the deceased across the bridge and struck the fatal blow. We think the state failed to connect the defendant with it, and therefore the verdict is unsupported by the evidence.

REVERSED.

JONES ET AL. V. CURRIER.

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103 104

1. **Homestead: CONVEYANCE TO STRANGER AND BY HIM TO WIFE: ABANDONMENT.** The conveyance by a husband of his homestead to a stranger, who afterwards reconveys to the wife, must, in the absence of evidence that the purpose was simply to vest the title in the wife, be regarded as an abandonment of the homestead by the husband, although he does not cease to occupy it.
2. **Evidence: ERROR IN EXCLUDING MUST AFFIRMATIVELY APPEAR.** Where the record fails to show the grounds on which evidence was excluded, this court cannot say that there was error in excluding it. Error must affirmatively appear.
3. **Practice: RIGHT TO DISMISS WITHOUT PREJUDICE: FINAL SUBMISSION: WHAT IS NOT.** Before a case has been finally submitted, the plaintiff has the right to dismiss it without prejudice to a future action; (Code, § 2844;) and a case is not *finally* submitted when, after being once submitted, the court permits an amendment raising a new issue.

Appeal from Buchanan Circuit Court.

WEDNESDAY, MARCH 18.

ACTION in chancery to restrain the sale of certain land upon executions issued on judgments against plaintiff, Jones, on the ground that the land constituted plaintiff's homestead. After a trial, plaintiff's petition was dismissed. He and intervenors unite in an appeal to this court.

Jewell & Shellito, for appellants.

E. E. Hasner and *Daniel Smyser*, for appellee.

BECK, CH., J.—I. We suppose the circuit court held that the homestead, which plaintiff claims, had been abandoned by him by the sale thereof, though he continued to occupy it until its reconveyance to his wife, and thereafter until her death. His occupancy continued until the commencement of this suit. We are not authorized to assume, in the absence of evidence, as plaintiff claims, that the conveyance by him was for the pur-

1. HOME-
STEAD: con-
veyance to
stranger and
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wife: aban-
donment.

pose of vesting the title in his wife, and without any intention to abandon his homestead rights. Clearly, unless such purpose be shown, this conveyance would defeat the homestead.

II. After the case had been submitted to the court, the plaintiff asked and obtained leave to file an amendment to his petition, and then asked to dismiss the cause without prejudice, which was denied him. The correctness of the abstract as to these facts is not disputed. The plaintiff, as is shown in the abstract, filed an affidavit supporting a request to be permitted to introduce additional testimony in his behalf, which was refused. The statement of the abstract, as to these matters, is denied by defendants. These rulings are complained of by plaintiff.

III. As to the refusal of the court to permit the introduction of the evidence proposed by plaintiff, the record fails to show the grounds of the ruling, and to disclose fully all facts upon which this action was had. Error does not appear affirmatively. We cannot, therefore, declare that the court's ruling was wrong.

IV. As to the refusal of the court to permit plaintiff to dismiss his action without prejudice, we think the circuit court erred. The court had permitted the plaintiff to file an amended petition. This was, in effect, permitting new issues to be raised. And a new issue was, in fact, tendered by the amended petition, which was not filed for the purpose of conforming the pleadings to the proof, but to tender an issue upon a fact of which no proof had been offered. It cannot be said that, pending the submission of this issue, the cause had been *finally* submitted. The circuit court evidently considered that it had not been. We are authorized to presume that the first submission had been set aside in order to present the new issue to be tendered. The case being in that position, not having been finally submitted, the plaintiff had the right to dismiss his case without prejudice to a future action.

2. EVIDENCE:
error in ex-
cluding must
affirmatively
appear.

3. PRACTICE:
right to dis-
miss without
prejudice:
final submis-
sion: what is
not.

Buckham v. Grape et al.

Code, § 2844. In refusing plaintiff's request for the dismissal of his petition without prejudice, the court erred.

The decree of the circuit court is reversed, and the cause is remanded for an order in the court below, dismissing the action without prejudice to the rights of any of the parties.

REVERSED.

BUCKHAM V. GRAPE ET AL.

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65	535
105	70

1. **Kind of Proceedings:** ACTION TO ENFORCE LIEN UPON REAL ESTATE: THIRD PARTIES INTERESTED. An action brought to enforce an alleged lien upon real estate in which third parties, made defendants, are interested, and where questions as to the validity of conveyances and mortgages and the priority of liens are to be determined, is an action by equitable proceedings, and defendants in such an action are not entitled to a jury trial.
2. **Intoxicating Liquors:** WRONGFUL SALE TO HUSBAND: JUDGMENT FOR DAMAGES TO WIFE: ACTION TO ENFORCE JUDGMENT AS LIEN ON LEASED PREMISES: JUDGMENT AS EVIDENCE OF AMOUNT OF LIEN. Plaintiff had obtained judgment against one W. for wrongfully selling to her husband intoxicating liquors, on property leased of defendant G., and in this action she seeks to have her judgment established and enforced as a lien on the property, under the provisions of section 1558 of the Code. To prove the amount for which she should have a lien, she introduced, against G's objection, the record of the judgment. *Held* that the record was admissible for the purpose only of proving that he had obtained the judgment, but that it was not admissible as against G., who was not a party thereto, as to the amount to which his property should be subjected. REED, J., *dissenting*.
3. ———: ———: PRACTICE. In such cases the property owner should be made a party to the original action, so as to make the judgment binding upon him.

Appeal from Fremont Circuit Court.

THURSDAY, MARCH 19.

ACTION IN EQUITY. Judgment for the plaintiff, and defendants appeal.

Draper & Thornell, for appellants.

Holmes & French, for appellees.

SEEVERS, J.—The petition states that the plaintiff recovered a judgment in the circuit court of Shelby county against one Wolf, on the ground that he had sold her husband intoxicating liquors whereby he became intoxicated; that at the time said liquors were so sold, Wolf occupied certain premises belonging to the defendant Grape, who had knowledge of and consented to said sales; that Grape caused the real estate described in the petition to be conveyed to Elizabeth White, who conveyed the same to Ida Grape, wife of the said defendant; that Ida Grape died, and devised the real estate to her two children, and named her husband, the defendant Grape, as executor, without bond, and gave him power to sell any or all of the property so described as he should deem proper.

The will was admitted to probate. Certain claims were filed against the estate of Ida Grape, and the defendant, as executor aforesaid, conveyed said real estate to his nephew, H. R. White, who conveyed the same to the defendant Grape, who executed a mortgage to the defendant Elizabeth White.

It is alleged in the petition that in truth and in fact the said Grape was at all times the owner of said property, and that said conveyances and mortgages were fraudulent and void, because the same were made to hinder and delay creditors.

The relief asked is that the said judgment against Wolf be declared a lien on the real estate, and that the mortgage above described be set aside.

The defendants answered the petition, and demanded a trial by jury, which was refused.

I. It is said that this ruling of the court is erroneous, and *La France v. Krayner*, 42 Iowa, 145, and *Loan v. Hiney et al.*, 53 Id., 89, are cited.

Complete relief could not have been afforded at law. Eliza-

beth White could not have been made a party in a purely legal proceeding, and the questions as to the validity of the conveyances and mortgages, and the priority of liens thereunder, had to be determined. Therefore, we think, the action was properly brought and tried as an equitable action.

II. The plaintiff, against the defendants' objection, introduced in evidence a transcript of the judgment against Wolf. It is insisted that the court erred in admitting the evidence. The appellee insists that the introduction of the judgment made a *prima facie* case, and that, in the absence of any defense, it is conclusive as to the amount for which the plaintiff is entitled to have the lien established. If Grape had been a party to the action, we think the position of appellee would be correct. But, as he was not a party, the question is whether a judgment which he has had no opportunity of contesting constitutes any evidence against him. If the judgment constitutes any evidence against the defendant, we think it is conclusive as to the amount for which plaintiff is entitled to a lien on the defendant's property, unless, possibly, the judgment has been obtained by fraud. There is no middle ground.

In *Loan v. Hiney et al.*, 53 Iowa, 89, it is said that the property-owner has the right to contest the question as to whether intoxicating liquors were in fact sold. If this is so, it follows that such person has the right to contest the amount the plaintiff is entitled to recover. It seems to us that on principle this must be so. A party should not be conclusively bound when he has had no opportunity to speak.

But it is said that the statute provides that the lien shall be established, for "judgments rendered against any person for any violation" of the statute, on the property in which the liquor was sold with the knowledge and consent of the owner. Code, § 1558. The statute is silent as to whether the property-owner must have notice or knowledge of the judgment or not; and, if construed literally, it would cover a judgment rendered by default, or one of which he did not

have the slightest knowledge until the attempt is made to enforce it.

We think the statute should be construed with reference to universally recognized legal principles. It cannot be presumed that the general assembly intended that a person's property should be taken or appropriated to the payment of a judgment which he had no opportunity of contesting.

To give such a construction to the statute would, in effect, deprive a party of his property without due process of law. Such a statute would be in conflict with the constitution of the United States and of this state.

It is evident, we think, that it was the intention of the general assembly that, in actions brought by a wife for a sale to her husband of intoxicating liquors, she could, if she saw proper, make the owner of the property a party to the action, and therein try, and have determined, all questions necessary to enable the plaintiff to recover and establish a lien on the property in which the liquor was sold. This court has in effect so held in the cases above cited.

We incline to think that the judgment was properly introduced in evidence for the purpose of showing that the plaintiff had recovered against Wolf, but it was not evidence as to the amount for which the lien should be established, except that in no event could the plaintiff's lien be for any greater amount; but there is no evidence sufficiently establishing the amount of the plaintiff's lien. It is true, there is evidence tending to show that Wolf sold the plaintiff's husband intoxicating liquors, and that he became intoxicated, and also that Grape had knowledge of such facts, but there is no evidence tending to show the plaintiff's damages, other than the judgment.

REVERSED.

ON REHEARING.

BECK, CH. J.—A rehearing was allowed in this case upon the petition of plaintiff, and the cause has again been submit-

ted upon a re-argument. We adhere to the conclusions reached in our former opinion, and are now unable to add anything which will give additional strength to the arguments we have presented in their support. I may say for myself that from the first I had grave doubts of the correctness of our decision. I was brought to concurrence in it by the consideration of the settled policy of the law, which will deprive no man of property or rights without giving him the fullest opportunity to defend them. A judgment, therefore, ought not to be enforced as a lien upon property until the owner, either by himself or his privies, has had an opportunity to resist it. It should not be regarded as evidence of liability of the property, if the owner has not been a party to the proceeding in which it was rendered. I am fully aware of the difficulty of reconciling these views with the express language of the statute, which declares that in cases of this character judgments against the vendors of intoxicating liquors shall be liens upon the property wherein they were sold with the consent and knowledge of the owner. The position of the former opinion, that the statute should be construed in harmony with the doctrines of the law which secures the right of the owner to defend and protect his property, seems to remove these difficulties; but I am brought to full assent to the conclusion we have adopted by the consideration that

3. —: —: the property owner could have been made a party
practice. to the original action, and the rule requiring him to be joined therein in order to bind him by the judgment would, in all cases, operate so as to secure the ends of justice, and in no case work hardship. Before his property can be reached under the statute, an issue must be joined and tried involving his knowledge of the sales of intoxicating liquors upon his property. These issues may be tried in the original case. Why not determine all the issues which the property owner may raise, in the action against the vendor, the property owner being joined therein? The liability of his property could be determined in one case, instead of two, if

he should be separately sued. If he be made a party to the action, he would be bound by the judgment, and, without further proceedings, it could be declared a lien upon his property. By this practice justice would be done to all parties, and they would be relieved of litigating two cases, when all their rights could be and ought to be settled in one. I think the rule we adopt will not only promote the ends of justice, but will lessen the expense and hasten the decision of controversies of the character of the one before us.

We adhere to the former opinion, and again order the judgment of the circuit court to be

REVERSED.

REED, J., *dissenting*. The original opinion, as I understand it, holds that plaintiff is not entitled to have her judgment against Wolf established as a lien on defendant's real estate, without other proof of her damages than that afforded by the record of the judgment. In my opinion this position is not tenable. Under the statute (Code, § 1558) she is entitled to have the judgment established as a lien on the real estate, if it was used and occupied by Wolf, at the time of the sales of intoxicating liquors to her husband, for the purpose of selling such liquors contrary to law, and such use was with the knowledge and consent of the owner of the property. To entitle her to the remedy provided by the section, she must establish the following facts: (1) That the judgment against Wolf was rendered for a violation of the provisions of the statute prohibiting the sale of intoxicating liquors; (2) that the real estate was used and occupied by Wolf for the unlawful sale of intoxicating liquors when the cause of action on which the judgment was rendered accrued; and (3) that such use and occupation of the property was with the knowledge and consent of the owner thereof.

When these facts exist, the statute declares that the judgment shall be a lien on the property until paid. The provision is penal in its character. The judgment against the ven-

dor of the liquors is made to attach as a lien upon the property used in the unlawful business, as a punishment of the owner for permitting the use of his property for such unlawful purpose. *Polk Co. v. Hierb*, 37 Iowa, 361. It is the judgment, and not the damages, with which the property is charged. Judgment must be obtained against the vendor before any charge can be established against the property; and the amount of the judgment against him measures the amount of the charge on the property. This view does not deprive the property owner of his property without due process of law. He has his day in court, and may controvert the existence of any one or all of the facts which, under the provisions of the statute, must be established before his property can be charged.

But the amount of the damages is not in question. The judgment against the vendor establishes the amount of the recovery, and the question here involved is, whether the amount so established shall be made a lien upon the property; and that question depends upon whether the three facts exist which the statute provides must exist before the property can be charged with the judgment. The holding of the opinion, it seems to me, will lead to most remarkable results. The statute provides that fines assessed, as well as judgments rendered, for violations of the statute, shall be liens upon the real estate used in the unlawful business with the knowledge and consent of the owner. One who is convicted of keeping a place where intoxicating liquors are sold contrary to law may be fined, not exceeding \$1,000, at the discretion of the court. Suppose the court, in the exercise of its discretion, has assessed a fine of that amount against one convicted of that offense, and the state, by a proper proceeding, undertakes to establish this fine as a lien upon the property used and occupied by the party in the unlawful business. The express provision of the law is that the fine so assessed shall be a lien upon the property so used and occupied, if the use and occupation was with the knowledge and consent of the

owner. But, if this holding is followed to its logical conclusion, the state, before it can have judgment in such proceeding, must prove not only that the fine has been assessed, but must go further, and prove that the party against whom it was assessed was guilty of the crime, and that his offense was sufficiently aggravated to warrant the court in assessing a fine of that amount; and we would have the remarkable spectacle of a court reviewing the final judgment of another court of concurrent jurisdiction, and that, too, in a matter in which, for the reason that the amount of the fine was within the discretion of the court assessing it, a court of last resort would not think of interfering.

And further than this, plaintiff's judgment against Wolf may consist very largely of the punitive damages assessed by the jury in the case. We have held that in that class of cases plaintiff, if she was entitled to recover at all, was entitled, under the statute, to exemplary as well as actual damages. See *Fox v. Wunderlich*, 64 Iowa, 187. But the amount of the assessment is left very largely to the discretion of the jury. Indeed, the courts trying such cases are authorized to interfere with the award of the jury only when the amount of the assessment is such as to indicate that it was made under the influence of passion or prejudice. But under this holding another court, when trying the question whether the judgment for damages shall be made a lien upon the property used and occupied in the business, is required to review the finding of the jury, and pass upon the justice and propriety of their award of damages. I am confident that the legislature never intended, when it enacted the law, that it should have such an effect; and I am equally clear that no good reason exists for putting such a construction upon it as will lead to these results. In my opinion the judgment of the circuit court ought to be affirmed.

INMAN V. BALL ET AL.

1. **Measure of Damages: ERRONEOUS INSTRUCTION.** An instruction as to the measure of plaintiff's damages in this case not being warranted by the allegations and proof, and it appearing from the verdict that defendants were prejudiced thereby, *held* that the giving of the instruction was revisible error.
2. **Exemplary Damages: WHEN TO BE ASSESSED.** In order to justify the assessing of exemplary damages, it must be made to appear that the act complained of was a willful or malicious wrong; and an instruction in this case, to the effect that the defendants were liable for exemplary damages, if they, when they committed the acts, *had good reason to believe they were wrongful, held* erroneous.

Appeal from Union Circuit Court.

THURSDAY, MARCH 19.

THE plaintiff claims \$2,000 of the defendants as damages for unlawfully, willfully and maliciously taking from her private dwelling certain household goods, and converting the same to their own use. Defendant, John M. Ball, in his answer to the petition, claimed that the plaintiff executed a chattel mortgage upon said property to him, to secure the payment of part of the purchase price of the goods, and that he afterwards assigned said mortgage to his co-defendant, Harrison, who foreclosed the mortgage by putting the same in the hands of the defendant Ballou, who was sheriff, and that he (said Ball) only acted in the matter by pointing out the goods covered by the mortgage, and that no other goods were seized or taken from the plaintiff excepting such as were included in the mortgage. The defendant Harrison answered by setting up substantially the same facts, and he further averred that the goods were sold in accordance with the terms of the mortgage by the defendant Ballou, and the proceeds turned over to him (said Harrison) in satisfaction of the mortgage. The defendant Ballou admitted taking the goods, but alleged that none were taken excepting such as were mort-

gaged, and that the goods were identified and pointed out to him by the defendant Ball. There was a trial by jury, and a verdict and judgment for the plaintiff, and against the defendants, Ball and Harrison, for \$400. Defendants appeal.

John Chaney and Rowell & Milligan, for appellants.

Stuart Bros., for appellee.

ROTHROCK, J.—I. The court instructed the jury that the plaintiff could not recover unless she established by a preponderance of the evidence that the defendants took goods which were not included in the mortgage. This instruction is in full accord with the evidence, and it is not claimed that any recovery can be had for taking the mortgaged property. The plaintiff claimed damages for the willful and malicious seizure and conversion of her goods. The goods in question consisted of the furniture, bedsteads, bedding, etc., which had been used in a hotel. The plaintiff purchased part of this property from Ball, from whom she leased the hotel, and she executed the mortgage to secure the payment of part of the purchase-money. She previously owned some goods of about the same kind and quality, which she put in the hotel. The hotel was destroyed by fire, but nearly all of the furniture, bedding, etc., were saved. It was stored by the plaintiff in another building, and some of it was used by the plaintiff, and her son and daughter, in certain furnished rooms which they occupied.

There is a conflict in the evidence as to whether any property was seized and taken by the defendants, excepting such as was included in the mortgage. The plaintiff in her testimony stated that certain articles were taken, and she fixed the value thereof at about the sum of \$50. The great preponderance of the evidence is that, even if the property specified by the plaintiff was taken, it was of very much less value than \$50. As an example, the plaintiff testified that an old feather-bed which had been in use for thirty years was

taken, and that it was of the value of \$20. All of the other evidence in the case shows that the value was but \$3 or \$4. But, as there was a conflict in the evidence as to whether property not included in the mortgage was taken, and as to its value, we would not be warranted in disturbing a verdict for about \$50 of actual damages.

The court instructed the jury upon the question of damages as follows: "No. 8. If the jury find from the evidence that the defendants entered the private dwelling of plaintiff, and for the purpose of taking possession of goods covered by a chattel mortgage, and by virtue of said mortgage; and you further find that the defendants at the same time took possession of and carried away other goods not included in said mortgage, over the objections or without the consent of plaintiff,—such a taking and carrying away of such goods not included in the mortgage would be a wrongful conversion, and the plaintiff would be entitled to recover damages for the injury she has sustained in actual value of the goods so taken, as shown from the evidence; and if she has shown that she sustained any special loss by reason of being deprived of possession of the goods, then she would be entitled to the damages which she has proved to have sustained, as a special loss, by being deprived of the use of the goods taken."

Under the issues in the case, the plaintiff was entitled to recover the actual value of the goods taken, and exemplary damages, within the reasonable discretion of the jury, if the evidence warranted exemplary damages. She was not entitled to recover anything for special loss by reason of being deprived of the goods, because such a recovery was neither warranted by allegation nor proof. The instruction therefore was erroneous. If the verdict had been for the actual value of the goods, it might, with some propriety, be claimed that the error was without prejudice. But as the verdict was largely made up from considerations aside from the value of the

1. MEASURE
of damages:
erroneous in-
struction.

goods, and as we do not think the jury were warranted from the evidence in finding that the defendant Harrison was liable for exemplary damages, we incline to think that the special loss referred to in the foregoing instruction had much to do with the amount of the verdict.

II. The court, in instructing the jury upon the question of exemplary damages, stated that, if they "found that the defendants committed the wrongful acts complained of, and at the time they committed the same they had full knowledge that the acts were wrongful, *or had good reason to believe they were wrongful*, then the doing of the thing would be willful and malicious." We think that the clause in this instruction which we have indicated by italics should not be held to authorize the allowance of exemplary damages. To warrant a jury in inflicting damages by way of punishment, it should appear that the act complained of was a willful or malicious wrong. There must be a purpose or intent to harass, oppress, or injure another. This is a very different state of mind and purpose from that of a person who has no more than good reason to believe that his act is wrongful. In such case a party might be visited with exemplary damages for committing a mere blunder without wrongful, willful, or malicious intent. The law attaches no such consequences to a mere mistake.

III. The defendant Harrison was not present when the goods were taken. The evidence shows that he did not know that any property not included in the mortgage was taken by the sheriff. There is some evidence tending to show that Ball advised him, after the goods were seized, that the plaintiff claimed that some of the goods taken were not in the mortgage, and that he replied, if "they would come over and identify the goods, they should be returned," and that this offer was communicated to plaintiff's attorney. Under this state of facts, any assessment of exemplary damages against Harrison was wholly without

2. EXEM-
PLARY dam-
ages: when to
be assessed.

THE SAME.

Paine v. Means et al.

warrant from any proven fact, or even from any inference in the case.

For the errors above pointed out the judgment of the circuit court is

REVERSED.

PAINÉ V. MEANS ET AL.

1. **Homestead: LIABILITY FOR PRIOR DEBT: BURDEN OF PROOF.** A debt contracted prior to the acquisition of a homestead will be enforced against the homestead, unless the owner affirmatively establishes facts which show that it is exempt from such debt.
2. **Practice on Appeal: ABSTRACT NOT DENIED: MOTION TO STRIKE OUT EVIDENCE.** Where appellant in an amended abstract states that the original and amended abstract contains all the evidence, and this is not denied by appellee, it must be taken as true, and a motion to strike out the evidence in such case, because not properly certified, overruled.

65	547
121	361

Appeal from Kossuth District Court.

WEDNESDAY, MARCH 19.

ACTION in equity to subject certain real estate, the title to which is in defendant, Martha S. Means, to a judgment in favor of plaintiff against defendant, John B. Means. The judgment of the district court subjects the property to sale for the satisfaction of a portion of the judgment only. Plaintiff appeals.

• *J. H. Hawkins*, for appellant.

George E. Clarke, for appellee.

REED, J.—There is no controversy as to the facts of the case. They are as follows: Defendant, John B. Means, and plaintiff are brother and sister. In 1874 their father died intestate, leaving these parties and three other children his

sole heirs. At the time of his death he was the owner of a farm of 160 acres. John B. Means was a married man, and he lived upon and cultivated the farm from the time of his father's death until 1879. In 1877 he purchased the interest of each of the other heirs in the farm. Plaintiff was the last of the parties to sell her interest, and defendant agreed to pay her \$200 for it. In 1879 he exchanged the farm for the property in controversy, taking the title thereto in himself, and in 1880 he conveyed it to his co-defendant, who is his wife. Ever since the exchange the defendants have lived upon and occupied the premises as their homestead. After the conveyance of the property to the wife, plaintiff obtained judgment against defendant, John B. Means, for the \$200 which he agreed to pay her for her interest in the farm, together with the interest thereon, and she is seeking by this proceeding to subject the property to the satisfaction of this judgment, on the ground that the conveyance to Martha S. was voluntary, and the other defendant was insolvent when the conveyance was made. The farm was worth \$2,000 when the exchange was made, but it was incumbered by mortgages and delinquent taxes to the amount of \$1,200, and the property received in exchange was worth \$800.

It is not claimed that there was any consideration for the conveyance to the defendant, Martha S. Means, nor is it contended that the property would be exempt from sale in her hands, if it would be subject to sale for the satisfaction of said judgment if the title remained in her co-defendant. But defendants' claim is that they had a homestead interest in the farm, which was exempt from judicial sale for the satisfaction of said debt, and consequently the property in question is exempt to the extent of the value of that interest. The judgment of the district court establishes plaintiff's judgment to the amount of \$160 as a lien on the property, and directs the sale of the property for the satisfaction of that amount. As this amount is one-fifth of the value of the property at the time of the exchange, we infer that the dis-

strict court proceeded on the theory that defendants had a homestead interest in the farm, but, as plaintiff sold a one-fifth interest in it, she could subject that proportion of the interest to the satisfaction of the debt, and that the new homestead was liable therefor to the same extent. Conceding, for the present, the correctness of this theory, we have to say that upon the proof in the case we are not able to hold that any interest in the property is exempt from sale for the satisfaction of any portion of the judgment. As the debt evidenced by the judgment was contracted before the property in question was acquired, the burden is on defendants to establish that it is exempt from judicial sale for the satisfaction of the judgment. *First Nat. Bank v. Baker*, 57 Iowa, 197.

The farm consisted of 160 acres, of the value of \$2,000. The incumbrances on it amounted to \$1,200. The purchaser took it subject to these incumbrances, and the property in question represents the difference between the whole value and the incumbrance. Defendants' homestead right in the farm was limited to 40 acres and the house in which he lived, (Code, §§ 1994-1996,) and the evidence does not enable us to determine the value of that right. There is no evidence of the value of the house, nor are we able to determine the value of the portion of the farm which defendants would have been entitled to set off with the house as their homestead, in comparison with the balance of the farm. Nor are we informed as to how the value of the homestead right was effected by the incumbrances. It is impossible, therefore, to determine that the property in question represents the value of the homestead right in the farm, or that that value is represented by any proportion of the value of the property. As the burden of proof is on the defendants, they are not entitled on this showing to have any portion of the property adjudged exempt from sale in satisfaction of the judgment.

II. Appellee filed a motion to strike out of the abstract what purports to be the evidence in the case, on the ground

that it is not sufficiently identified as the evidence on which the case was tried in the district court. The abstract contains the certificate of the judge of the district court, in which he certifies that certain depositions and exhibits to which the certificate was attached were introduced in evidence, and that this is all the evidence which was offered or introduced on the trial. The depositions are referred to in the certificate as being marked by certain letters, and the documentary evidence, as being marked by certain figures, but they are not otherwise identified. The ground of the motion is that the abstract does not identify the depositions and documents printed therein as being the same that are referred to in the certificate. But it is alleged in an amended abstract filed by appellant that all the evidence offered, introduced, or used in the trial is set out in the original and amended abstracts, and this allegation is not denied. Nor is it alleged that the abstracts contain any evidence which was not introduced on the trial. We will presume on this state of the record that we have all the evidence before us. The motion is therefore overruled, and the judgment of the district court is reversed, and the cause will be remanded to the district court, with directions to enter a judgment granting to plaintiff the relief prayed in her petition; or, if plaintiff so elects, such judgment will be entered in this court.

REVERSED.

SCRIBNER, BURROUGHS & Co. v. RUTHERFORD.

65	551
112	192

1. **Practice: MOTION IN VACATION.** A motion in arrest, and for judgment notwithstanding the verdict, cannot be filed and considered in vacation without an express agreement of the parties to that effect. Code, § 183.
2. **Letter of Credit: WHAT IS NOT: AGREEMENT TO BECOME BOUND BY NOTE: CONDITIONS OF LIABILITY.** Defendant wrote to plaintiffs as follows: "K. wants a little money. If you want any one on the note, I will fix it when I come in." *Held* that this was not a letter of credit, nor an independent contract to pay the loan, but an agreement to become bound by a note in some one of the many ways by which he could be so bound; and that he was not bound at all until his proposition was, within a reasonable time, accepted, and the manner indicated in which he should become a party to the note,—which was never done.
3. ———: ———: ———: **RATIFICATION: STATUTE OF FRAUDS.** In such case, a subsequent oral agreement to pay the money borrowed by K. did not create any liability by reason of the letter, but was a separate contract, and within the statute of frauds.
4. ———: **WHAT IS.** A letter of credit is, in effect, an absolute undertaking to pay the money advanced upon the faith of the instrument.

Appeal from Cherokee District Court.

WEDNESDAY, MARCH 19.

ACTION to recover of defendant the amount due on a promissory note executed by another. There was a judgment upon a verdict for plaintiff. Defendant appeals.

Finkbine & McClelland and *F. H. Chapman*, for appellant.

J. D. F. Smith and *A. F. Meservy*, for appellee.

BECK, CH. J—I. The petition, as a cause of action, alleges that defendant wrote and sent to them a letter, which was received by them, in the following words:

"*Scribner, Burroughs & Co.*: A. P. Kenyon wants a

little money; if you want any one on the note, I will fix it when I come in.

“R. B. RUTHERFORD.”

That plaintiff, relying solely upon this letter, loaned Kenyon a sum of money, for which he executed his note due in two months, which is set out in the petition; that the note is now due and a balance remains unpaid, a part of the amount having been paid before, and a part after, maturity; and that the note has been presented to defendant for payment, which was refused. An amended petition alleges that, after loaning the money upon the note, plaintiffs, both before and after its maturity, notified defendant of the date of the maturity of the note; and that the note was shown to defendant, who “assented to all the terms and conditions of the note; and agreed to repay plaintiffs the money so loaned.”

Defendant in his answer admits the execution of the letter, but denies notice of acceptance by plaintiffs, and that he agreed to pay plaintiffs the money loaned to Kenyon. As a further defense, he pleads that on two occasions subsequent to the maturity of the note he inquired of plaintiffs if they had any notes against Kenyon, and, being informed that they had not, he parted with the possession of the property of Kenyon, which he had held, and that Kenyon was at that time and has since been insolvent. The cause was submitted to the jury just before the time prescribed for the adjournment of the term, and therefore the parties agreed that the jury should return a sealed verdict to the clerk, to be opened after adjournment; either party to have ten days to file a motion for a new trial, to be decided in vacation, and sixty days from the ruling on the motion to prepare and file a bill of exceptions. A motion for a new trial was filed under this agreement, and overruled. Defendant also filed a motion in arrest of judgment, and for judgment *non obstante veredicto*, which the district court refused to entertain.

II. The court below rightly refused to entertain the

motion in arrest and for judgment *non obstante veredicto*,
 1. PRACTICE: for the reason that it was not contemplated and
 motion in va- provided for by the agreement of the parties.
 cation. Such motion, in the absence of an agreement of the parties
 that it should be filed and considered in vacation, could not
 lawfully be entertained by the court. Code, § 183.

III. The motion for a new trial was based upon the
 ground, among others, that the district court erred in the
 instructions to the jury. We think it should
 2. LETTER OF have been sustained upon this ground. The
 credit: what instructions hold that the letter of defendant is a
 is not: agree- letter of credit, which, however, would not bind
 ment to be- defendant, for the reason that no specific amount
 come bound was mentioned or limited in the letter; but if the jury should
 by note: con- find that defendant "ratified the loan," and "gave plaintiffs
 ditions of lia- to understand that he would become responsible for the loan
 bility. that had been made," he is liable. Directions are given as
 to the character of proof which would establish a ratification
 contemplated by the instruction. Other doctrines of the
 instructions need not be stated.

We will proceed to inquire as to the obligations assumed
 by defendant by the letter upon which the suit is based. For
 the sake of clearness, we will here repeat its language, which
 is as follows: "A. P. Kenyon wants a little money. If you
 want any one on the note, I will fix it when I come in."
 This is not an undertaking to pay money, or in general terms
 to become liable for money to be borrowed by Kenyon, but,
 as we shall see, to become bound on a note for the money to
 be borrowed. The last clause of the letter will bear no other
 interpretation than that defendant proposed to become liable
 upon a note to be given for the money. But he does not
 indicate in what manner he proposes to bind himself by the
 note. He could become bound in many different ways: (1) He
 could have executed the note alone, and thus become a sole
 maker; (2) he could have executed it jointly with Kenyon,
 and would thus, as between the parties, have been a surety

3. — : — :
— : ratifi-
cation: stat-
ute of frauds :
considera-
tion.

performance indicated. The undertaking or "ratification," as contemplated by the petition and the instructions, pertained to another and different contract; indeed, such a contract is meant by the language of the petition and instruction. It is obvious that this contract was a different and separate contract from the contract of the letter. It would be an undertaking to answer for the debt or default of another, and therefore within the statute of frauds. But, even should it be held that it is not within the statute, a consideration should be shown to support it. None of these views were presented by the instructions to the jury.

V. The district court held that defendant's letter was, in effect, a letter of credit, and that defendant's obligation was that of a drawer of such an instrument. A letter of credit is, in effect, an absolute undertaking to pay the money advanced upon the face of the instrument. The letter of defendant is an offer to become bound by note. The distinctions between such instruments are obvious.

Other questions discussed by counsel need not be considered. For the errors in the instructions we have pointed out, the judgment of the district court must be

REVERSED.

THE STATE V. SCHMIDT.

1. **Intoxicating Liquors: ABUSE OF PERMIT TO SELL: REVOCATION BY DISTRICT COURT: JURISDICTION: HOW CAUSE ENTITLED: TRIAL BY JURY: CERTIORARI.** The district court has jurisdiction, under § 1535 of the Code, to revoke a permit granted by the board of supervisors for the sale of intoxicating liquors, upon proof that the holder thereof has sold such liquors for unlawful purposes. Such cause may be prosecuted by the informant in the name of the state, and be heard and determined by the court without a jury, and for error in such proceeding appeal, and not *certiorari*, is the proper remedy.
2. ———: ———: ———: **TITLE OF CAUSE: APPEAL BOND: DUTY OF COURT TO FIX.** It is not necessary that such proceeding be brought in the name of the state, as it is not a criminal action, but a special proceeding of a civil nature; and the court is not required in such a case to fix the amount in which the defendant must give bond for an appeal to the supreme court, as is provided when it is desired to supersede the judgment in a criminal action, pending an appeal.
3. ———: ———: ———: **APPEAL: CERTIORARI: STAY OF JUDGMENT.** Where it is shown to this court in an application for *certiorari*, that an appeal has been taken from such an order of revocation, this court will not command the execution of the order to be stayed pending the appeal, for no execution or process is required to carry the revocation into effect,—it being self-executory, and to stay execution for costs the defendant is at liberty to file a supersedeas bond. (*Jayne v. Drorbaugh*, 63 Iowa, 711.) This court has no power in such case to order that the permit be continued in force, pending an appeal.

Appeal from Sac District Court.

WEDNESDAY, MARCH 19.

THE board of supervisors of the county of Sac granted the defendant a permit to sell intoxicating liquors for lawful purposes. A citizen of the county "filed a written information, on oath, before the district judge," charging in substance that the defendant had sold such liquors for unlawful purposes. A citation was issued and served on the defendant, requiring him to appear before the district court and show cause why his permit should not be vacated. The defendant appeared and answered the information, and there was a

trial. The court revoked the permit, and the defendant applied for a *certiorari* to review the proceedings of the district court, on the ground that it had exceeded its jurisdiction, or had otherwise acted illegally.

Ed. R. Duffie and *M. M. Gray*, for defendant.

J. W. Cory and *W. A. Helsell*, for plaintiff.

SEEVERS, J.—I. The defendant demanded a trial by jury, and moved to strike out the name of the state as plaintiff, and insert the name of the person who filed the information. The motion was overruled, and a trial by jury refused. In so doing, it is said the court exceeded its jurisdiction, or acted illegally. The court, under the statute, (Code, § 1535,) undoubtedly had jurisdiction, and it is clearly provided therein that the court shall hear the cause, and, if the charge is sustained by the evidence, shall revoke the permit. The constitution provides that the right of trial by jury shall remain inviolate, and that no person shall be deprived of life, liberty, or property without due process of law. Article 1, § 9, Const. The defendant paid nothing for the permit, and the inquiry seems to be pertinent, was he deprived of property when the permit was revoked? The law under which the permit was issued provides in express terms that if the defendant sold liquors for unlawful purposes the permit should be revoked. He received and accepted the permit under such condition. He was not, therefore, deprived of property when the permit was revoked. *Hurber v. Baugh*, 43 Iowa, 514. Therefore it cannot be said that the defendant has been deprived of property without due process of law.

Again, as the court had jurisdiction of the subject-matter, the refusal of a trial by jury, and the overruling of the motion, did not have the effect to oust the court of jurisdiction; and, conceding that it erred, the appropriate remedy for the cor-

1. INTOXICATING liquors. abuse of permit to sell: revocation by district court: jurisdiction: how cause entitled: trial by jury: certiorari.

2. ____: ____: bond for on appeal to the supreme court, as is provided in criminal actions when it is desired to supersede the judgment pending the appeal. This duty of court to fix.

III. The defendant, as we are advised, took an appeal to this court, and gave a bond conditioned as provided in civil cases, when it is desired to supersede the judgment of the district court, and, as a matter of precaution, on the ground that the appeal and

bond may not have such effect, we are asked to make an order staying or superseding the judgment, in aid of the appellate jurisdiction of this court. It is claimed by one of the counsel for the plaintiff that an appeal cannot be taken because it is not authorized by law; but we think the judgment of the district court must be regarded as a "final order in a special proceeding, affecting a substantial right," and therefore appealable. Code, § 3163. The permit has been revoked. It is no longer in force. The judgment, in this respect, has been executed. It was self-executing. No process is required unless to collect the costs. There is nothing else to supersede. And that the appeal and bond will have the effect to stay the issuing of process to collect the costs, we have no doubt. *Jayne v. Drorbaugh*, 63 Iowa, 711.

In substance, then, we are asked not only to grant a restraining order, but make an order continuing the permit in force, pending the appeal. This we cannot do; this court has no such power. We may restrain by injunction, but there is nothing to restrain so far as the permit is concerned; and we may compel action in a proper case by *mandamus*. The former would be unavailing, and the latter cannot be invoked. Nor has the court inherent power to do what is asked, for the reason that we can only, in a proper case, require the district court to act; and it has no power to reinstate the permit, unless it did so by setting aside the judgment for some reason recognized by law. The effect in such case would be to continue the permit in force.

The *certiorari* is refused; and we decline to make any other order.

THE STATE V. COOK.

1. **Criminal Law: RAPE: CORROBORATION OF PROSECUTRIX: EVIDENCE ON APPEAL.** Although the evidence contained in the abstract in this case tends very slightly, if at all, to corroborate the prosecutrix in a trial for rape, yet, as the abstract does not purport to contain all the evidence, this court cannot say that she was not corroborated.
2. ———: ———: **EVIDENCE OF CONSENT: DECLARATION OF PROSECUTRIX.** If the prosecutrix in this case, on the same day when the alleged rape was committed, stated to another woman, who had seen her and the defendant in questionable relations only a few minutes before the commission of the alleged rape, "that she had had sexual intercourse with the defendant, and would have it again, and did not care what other people might say," held that such statement should have been allowed to go to the jury as bearing on the question of her consent.

Appeal from Winneshiek District Court.

THURSDAY, MARCH 19.

THE defendant was convicted of the crime of rape, and sentenced to imprisonment in the penitentiary for fifteen years. He appeals.

M. J. Carter and C. P. Brown, for appellant.

Smith McPherson, Attorney-general, for the State.

ADAMS, J.—I. The prosecuting witness, Emily Barnum, testified that the defendant had sexual intercourse with her against her will, on the third day of January, 1884. The defendant insists that there is no evidence tending to connect him with the offense charged, except the testimony of the prosecutrix.

1. CRIMINAL
law: rape:
corroboration
of prosecu-
trix: evidence
on appeal.

It may be conceded that the evidence set out in the abstract tends to corroborate the prosecutrix but very slightly if at all; but the abstract does not purport to be an abstract of all the evidence, and we cannot assume that it is.

II. The evidence shows that on the third day of January,

The State v. Cook.

1884, the prosecutrix and the defendant were living in the

2. —: —: same house as members of the same family; that
 evidence of consent: de- immediately after dinner they were left alone in
 clarations of prosecutrix. the house; that while thus alone the defendant
 sat down in the prosecutrix's lap, and commenced to take
 improper liberties with her; that soon afterwards they went
 into a bed-room, where the defendant took still greater liber-
 ties. Whether he had sexual intercourse with her at that
 time is not clearly shown. The prosecutrix testified at one
 time that he did. But the state does not claim that he did,
 and the prosecutrix, in another part of the testimony, showed
 that he did not effect penetration. The bed-room, it appears,
 adjoins the kitchen. While the prosecutrix and the defend-
 ant were on the bed in the bed-room, a neighbor by the name
 of Fox, who resided about twenty-five paces therefrom, came
 into the kitchen, and as he came in he stamped his feet.
 The defendant arose and went into the kitchen, and the pro-
 secutrix soon followed him. She then went to a bed-room in
 the chamber. Fox soon left, and the defendant followed the
 prosecutrix to the chamber. Fox testified that he thinks that
 just as she left she slapped the defendant. She did not make any
 revelation as to what had transpired in the bed-room below, nor
 attempt to leave the house, nor call for help. She withdrew
 to a more retired part of the house, and to a room which con-
 tained a bed. She spread some quilts on the bed, and accord-
 ing to her testimony, the defendant had sexual intercourse
 with her on the bed. Whether the intercourse was with her
 consent was an important question for the jury to determine.
 The burden was on the state to show that it was without her
 consent, and she testified to that effect.

As bearing upon the question of consent in the chamber,
 the defendant was allowed to introduce the testimony of a
 person who was a spectator of the scene in the bed-room
 below. One Ella Browning, a neighbor, called as inoppor-
 tunely as Fox did, and about the same time. She went into
 a different room, however, which the witness designated as

the front room. It was separated from the bed-room by only a pasteboard partition, and the partition, it appears, had become torn. Through the hole she could look upon the bed. What she saw she described in these words: "I saw through the hole Emily Barnum and the defendant on the bed. She was lying on her back and the defendant was on her. Her legs hung over the bed, half way, and were spread apart. * * * I did not notice any scuffling when they were on the bed. I did not see any drawers on Miss Barnum. Her arm was over him just below the shoulder." She also testifies: "I saw them get up. The defendant went into the kitchen first. She got up and shook down her dress, and stirred up the quilts on the bed and went into the kitchen." The defendant's counsel then asked her a question in these words: "State whether or not on January 3, 1884, you heard Emily Barnum say that she had had sexual intercourse with the defendant and would have it again, and did not care what other people might say." To this question the state objected, and the objection was sustained. In our opinion the question should have been allowed. We do not say that proof of her consent to prior intercourse with the defendant would necessarily show that the intercourse at the time of the alleged offense was with her consent, nor do we say that her statement that she had consented to intercourse could be shown strictly as an admission. The testimony as to her statement, we think, was admissible upon other ground. It is certain that if she made the statement attributed to her, she is not a woman of chaste language and feelings, whether the statement is true or not. Such statement, too, if made, tended to show that her feelings towards the defendant had become of a very amatory character. The making of the statement was a circumstance entitled to go to the jury as evidence of much the same character as the evidence tending to show that she consented to intercourse in the bed-room below, a few minutes prior to the alleged ravishment.

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We think that the judgment must be reversed, and the case remanded for another trial.

REVERSED.

65	563
79	71

WALKER V. THE SIOUX CITY & IOWA FALLS TOWN LOT CO.

1. **Tax Sale and Deed: DEED WITHOUT NOTICE TO REDEEM: FACTS WARRANTING.** Where land sold for taxes is taxed to unknown owners at the time of giving notice to redeem, and is not in the possession of any one, a tax deed may lawfully be made without such notice. *Fuller v. Armstrong*, 53 Iowa, 683, and subsequent cases, followed.
2. **Pleading: REPLY: WHEN NOT REQUIRED: INSTANCE.** Under § 2665 of the Code, where, in an action to quiet a tax title, defendant alleged that the land was taxed to it at the time the deed was executed, and that no notice to redeem was served upon it, *held* that no denial by way of a reply was necessary to put the allegation that the land was taxed to defendant in issue.
3. **Tax Deed: RECITATION OF NOTICE TO REDEEM WHERE NONE WAS REQUIRED: ESTOPPEL.** Where the law required no notice to redeem in order to the execution of a valid tax deed, but the deed nevertheless recited the giving of such notice, *held* that such recital did not estop the holder of the deed from denying the necessity of such notice.

Appeal from O'Brien District Court.

WEDNESDAY, MARCH 19.

ACTION in chancery to quiet the title of certain lands in plaintiff. There was a decree granting the relief prayed for in the petition. Defendant appeals.

N. D. Parkhurst, for appellant.

Warren Walker, appellee, *pro se*.

BECK, CH. J.—I. The plaintiff claims title to the land under a tax sale and a treasurer's deed made thereon. The defendant in its answer claims ownership of the land, and alleges

Walker v. The Sioux City & Iowa Falls Town Lot Co.

that plaintiff's tax deed is invalid for the reason that defendant is a non-resident of O'Brien county, and had a duly appointed agent resident in that county, who was appointed pursuant to the Code, § 894, upon whom plaintiff was by law required to serve the notice of the expiration of the time for redemption, as contemplated by that section, and that such notice was not served, as required by law, upon the agent or upon defendant. The answer also alleges that the land was taxed to defendant at the time the treasurer's deed was executed. No reply was filed to this answer. The evidence shows that the land was taxed to "unknown owners," and not to defendant. It is not claimed that defendant was in the actual possession of the land. The treasurer's deed recites that notice had been given to defendant of the expiration of the time of redemption, as required by law. The action, being in chancery, is triable here *de novo*.

II. The land was taxed to unknown owners, and not to defendant, and it was not shown or claimed that it was in the possession of defendant, or any other person. The notice of the expiration of the time of redemption contemplated by Code, § 894, was, therefore, not required by that provision, and the deed could have been lawfully issued without it. *Fuller v. Armstrong*, 53 Iowa, 683; *Tuttle v. Griffin*, 64 Id., 455; *Parker v. Cochran*, Id., 757.

III. Defendant insists that, as plaintiff failed in a reply to deny the allegation of the answer, to the effect that the land was taxed to defendant, the fact stands as admitted, and it was not competent for plaintiff to establish the contrary by proof. But Code, § 2665, provides that "there shall be no reply except (1) where a counter-claim is alleged; or (2) where some matter is alleged in the answer to which plaintiff claims to have a defense by reason of the existence of some fact which avoids the matter alleged in the answer." The answer in this case

1. TAX sale
and deed:
deed without
notice to re-
deem : facts
warranting.

2. PLEADING:
reply: when
not required:
instance.

Walker v. The Sioux City & Iowa Falls Town Lot Co.

is not within either exception contemplated by this section.

IV. The deed recites that the notice had been given. If it should be held that this recital cannot be denied, it does

3. TAX DEED:
recitation of
notice to re-
deem where
none is re-
quired: es-
toppel.

not follow that it estops plaintiff to deny that the notice was required by the law. If it had been given, defendant's rights were not prejudiced thereby. If plaintiff did more than the law required in order to notify defendant that a deed would at a specified time be taken, defendant cannot complain. The rights of the plaintiff are fixed by the law, and whatever he may have done, which operated as indulgence or favor to defendant, and in no manner affected defendant prejudicially, cannot defeat them.

V. It becomes unnecessary, in view of the conclusion we reach that plaintiff was not required by the law to give notice of the expiration of the time of redemption, to consider the questions discussed by counsel for defendant involving the sufficiency of the notice and the appointment of an agent of defendant, as contemplated by Code, § 894. No questions other than these, and those we have passed upon, are discussed by defendant. Others are discussed by plaintiff, but their consideration is not demanded, under the view we take in the case.

AFFIRMED.

ROTHROCK, J., *dissenting.*

THARP V. WITHAM.

1. **Constitutional Law: RIGHT TO JURY TRIAL: TAKING LAND FOR HIGHWAY.** One jury trial is all that is guarantied by the constitution: and where such trial can be secured by appeal to the district or circuit court, and a party fails to appeal, he thereby waives his right to such a trial. (*State v. Beneke*, 9 Iowa, 203; *Zelle v. McHenry*, 51 Id., 572.) The rule in this case applied to the action of the board of supervisors in refusing to allow damages to a claimant in the establishment of a highway.
2. ———: **TAKING PRIVATE PROPERTY: COMPENSATION: WAIVER OF RIGHT.** Compensation for property taken for public purposes is guarantied by the constitution only where the owner pursues the usual and ordinary forms and remedies provided by law to obtain such compensation. By failing to avail himself of such remedies, he waives the right.
3. **Highway: INJUNCTION TO RESTRAIN OPENING OF: DAMAGES FOR OPENING WITHOUT NOTICE.** In an action to enjoin the opening of a highway because not legally established, damages cannot be recovered for opening it without legal notice.

Appeal from Van Buren District Court.

THURSDAY, MARCH 19.

THE defendant is a road supervisor, and the plaintiff brought this action to enjoin him from opening a highway, on grounds sufficiently indicated in the opinion. A temporary injunction was granted, which was dissolved on motion, and, at the final hearing of the petition, was dismissed. The plaintiff appeals.

Lea, Wherry & Walker, for appellant.

Sloan, Work & Brown, for appellee.

SEEVERS, J.—The highway was lawfully established by the board of supervisors, and the defendant was lawfully proceeding to open the same, unless the objections made thereto by the plaintiff are sufficient to invalidate the highway. The

Tharp v. Witham.

plaintiff filed before the board of supervisors in 1880 a petition, claiming \$500 as damages sustained by him, caused by the location of the highway. Commissioners were appointed to assess such damages, which they did, and reported to the board that the plaintiff was damaged in the sum of \$18. Afterward, in September, 1880, the board of supervisors, at the time fixed for final hearing, set aside the damages allowed by the commissioners, and established the highway. No appeal was taken from this action of the board, and this suit was not commenced until about eighteen months afterwards. Counsel for the appellant insist:

I. That private property cannot be taken or appropriated for public purposes except by due process of law, which means in the due course of legal proceedings, included in which is the right of trial by a jury of twelve men; and that, as the plaintiff's damages were not assessed by such a jury, the highway has not been lawfully established. From the decision of the board of supervisors, setting aside the damages allowed the plaintiff by the commissioners, he could have appealed to the circuit court, and, had he done so, he could have had his damages assessed by a jury of twelve men. Code, § 959. It has been held that "one jury trial is all that is guaranteed by the constitution," "and that is preserved by allowing an appeal, when the cause" can be tried by a constitutional jury. *State v. Beneke*, 9 Iowa, 203; *Zelle v. McHenry*, 51 Id., 572. By failing to appeal the plaintiff waived his right to a trial by such jury.

II. The board of supervisors had jurisdiction of the parties and the subject-matter. Their order setting aside the report of the commissioners allowing the plaintiff damages, was, at most, erroneous, and could have been corrected on appeal. The plaintiff failed to obtain damages by his own fault and negligence. It is true that he has been deprived of his property without compensation, but this result has not been accomplished

1. CONSTITUTIONAL law: right to jury trial: taking land for highway.

2. ———: taking private property: compensation: waiver of right.

Rivers v. Rivers.

by illegal means. On the contrary, it has been done in accordance with due process of law. Compensation for property taken for public purposes is guaranteed by the constitution only where the usual and ordinary forms and remedies provided by law are adopted by the person desiring to obtain such compensation. Having failed to avail himself of such remedies, the plaintiff cannot be permitted to say that he has been deprived of a constitutional guaranty.

III. It is insisted that the defendant could not lawfully open the highway without giving the plaintiff notice, as prescribed in Code, § 903. Conceding this to be so,

3. HIGHWAY:
injunction to
restrain open-
ing of: dam-
ages for open-
ing without
notice.

we do not think plaintiff can, in this action, recover any damages he may have sustained.

Having determined that the highway has been lawfully established, and that plaintiff is not entitled to the aid of a court of equity to restrain the defendant from opening it, this ends the case. The damages sustained by reason of cattle escaping from plaintiff's enclosure is not incidental to the equitable relief demanded. Besides this, the right to an injunction is not based on the failure to give such notice.

AFFIRMED.

RIVERS V. RIVERS.

1. **DIVORCE: FELONY: DECREE PENDING APPEAL: FORMER ADJUDICATION.** Where defendant was convicted of a felony, but appealed, and, pending the appeal, plaintiff began an action against him for divorce on account of such conviction, a decree was properly rendered for defendant, because the action was premature, so long as the conviction was not final; (*Rivers v. Rivers*, 60 Iowa, 378;) but such decree was not a final adjudication of plaintiff's right to a divorce for the cause alleged, and did not estop her from maintaining another action on the same ground after the judgment of conviction was affirmed.

Appeal from Monroe Circuit Court.

THURSDAY, MARCH 19.

ACTION FOR A DIVORCE. There was a decree for the plaintiff, and the defendant appeals.

Lafferty & Needham and *Anderson & Anderson*, for appellant.

John F. Lacey and *T. B. Perry*, for appellee.

ROTHROCK, J.—This is the second action between the same parties for the same cause. In the former action the plaintiff demanded a divorce upon the grounds of cruel and inhuman treatment, and that defendant, subsequent to his marriage, had committed adultery, and that he had three times been convicted of felonious crimes. The answer in that case denied all the allegations of the petition. The cause was tried upon its merits, and there was a decree for the defendant. Upon a trial anew in this court the decree of the circuit court was affirmed. See 60 Iowa, 378. The opinion of this court was filed in the case in January, 1883. This action was commenced in April, 1883, and the alleged ground for divorce was that the defendant was convicted of a felony by the judgment and sentence of the district court of Dallas county on the twenty-second day of April, 1881, and said judgment was affirmed by this court, on appeal, on the twentieth day of January, 1883. The facts as to the conviction and affirmance are not disputed, but it is urged by appellant that the right to a divorce for the cause alleged was adjudged against the plaintiff in the former action for divorce, and the former decree is relied upon as a bar to the present action.

The first action for a divorce was tried pending an appeal of the criminal case to this court, and, until the appeal was determined, the conviction and judgment of the district court were not a valid ground for a divorce. *Vinsant v. Vinsant*, 49 Iowa, 639; *Rivers v. Rivers*, 60 Id., 378. Appellant insists that, as the petition in the former case alleged the convictions of felony as grounds for divorce, and the answer

was a mere general denial, and the trial was upon the issues thus made, the adjudication in that case embraced all the cases where a judgment of conviction of a felony had been rendered by the district court. It is probably correct that a decree in an action for divorce is an adjudication of all causes for divorce then existing. But it is very plain that it is not an adjudication of a cause of action which subsequently accrues to the complaining party. The ground for a divorce now alleged had no existence when the former action for divorce was tried, simply because there had been no conviction which was a cause for a divorce, and if the plaintiff pleaded the conviction and relied upon it, the rule would not be different, because it was not then a ground for divorce, and could not be the subject of a binding adjudication between the parties.

AFFIRMED.

ARNOLD ET AL. V. SPATES ET AL.

65	570
121	715
121	716

65	570
138	676
138	678

1. **Estates of Decedents: FINAL SETTLEMENT AND DISCHARGE:**
NOTICE NOT NECESSARY. There is no provision of statute requiring notice to be given of an administrator's final report and application for discharge, and an order of discharge may be made without notice to persons interested, and, when made, it will have the force and effect of a judgment, and cannot be attacked in a collateral proceeding, but may be amended or set aside for any sufficient cause by a timely and proper proceeding.
2. —: **SETTING ASIDE FINAL REPORT AND ORDER OF DISCHARGE:**
FACTS WARRANTING EQUITABLE RELIEF. In this case, an administrator, upon notice published in a newspaper of the county, but without actual notice to the plaintiffs, (heirs,) who resided in the county, obtained an order of the court approving his final report and discharging him. *Held* that, after a lapse of two years, upon a showing that, by mistake or fraud, he had failed to report as to a certain fund and to charge himself therewith, the order was properly set aside, under § 2474 of the Code, in a suit in equity by the heirs against him and his bondsmen, and judgment rendered against them in favor of each of them for his distributive

Arnold et al. v. Spates et al.

share of the fund not accounted for. The provision of § 2475 of the Code, requiring proceedings to open such accounts to be begun within three months, does not apply to cases of mistake or fraud.

Appeal from Mahaska Circuit Court.

FRIDAY, MARCH 20.

PLAINTIFFS are the heirs of Alexander Arnold, deceased. Defendant, Robert Spates, was administrator of the estate of said Alexander Arnold, and the other defendants are the sureties on his administrator's bond. Said administrator filed a final report, which was approved by the circuit court, and an order was entered discharging him, upon the distribution of the assets in his hands; and he afterwards filed with the clerk of the circuit court certain vouchers, showing the distribution of said assets to the parties in law entitled to receive them. This proceeding was afterwards instituted by plaintiffs to vacate and set aside said order of discharge, on the alleged ground that the administrator had received large amounts of money which had been paid to him as interest or claims due the estate, and that through fraud or mistake he had neglected to make any report of said sums, although they were assets of the estate, and had never charged the same to himself in his accounts, or in any manner accounted for them, but had retained and converted them to his own use. Answers were filed controverting these allegations, and pleading the order of discharge as a bar to the action. The issue was sent to a referee for trial, and on his report an order was entered, setting aside the order of discharge, and giving plaintiffs a money judgment for the amount which it was found the administrator had not accounted for. Defendants appeal.

F. M. Davenport, for appellants.

Searle & Scott, for appellees.

REED, J.—The final report of the administrator was approved, and the order discharging him was made February

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25, 1879. Plaintiffs were residents of the county at that time, but they had no actual notice of the filing of said report, or of the application of the administrator to be discharged. The administrator, however, had caused a notice to be published in a newspaper published in the county that he would file his final report, and ask to be discharged from further service and responsibility as administrator of said estate, at the term during which the settlement was made. This proceeding was begun on the ninth of February, 1881. Defendants contend that by this published notice the court acquired jurisdiction of all persons interested in the estate, and that its order approving the settlement and discharging the administrator was made in the exercise of its proper jurisdiction, and is conclusive as to all matters included in the settlement. The statute (Code, § 2475) provides that any person interested in the estate may attend upon the settlement of accounts by the administrator and contest the same. But no express provision is made for making such persons parties to the settlement, nor is there any provision requiring notice of the proceeding to be given them. The final settlement and order of discharge may be made, we think, in their absence and without notice to them, and, when so made, it doubtless has the force and effect of a judgment; in so far, at least, that it cannot be questioned in any mere collateral proceedings. But, like any other judgment or order, it may be amended or set aside entirely, for any sufficient cause, by timely and proper proceedings.

Section 2474 provides that mistakes in the settlement of an administrator's accounts may be corrected, even after his final settlement and discharge, on showing such grounds for relief in equity as will justify the interference of the court. This proceeding is brought under this provision. Plaintiffs allege that by mistake or fraud the administrator omitted to charge himself in his accounts with a large amount of money

1. ESTATES of decedents: final settlement and discharge: notice not necessary.

2. ———: setting aside final report and order of discharge: facts warranting equitable relief.

which came into his hands as assets of the estate, and that this sum has never been accounted for by him. If the omission to charge himself with the amount occurred by his mistake, and the other circumstances of the case are such as to justify the interference of a court of equity, we have no doubt that a remedy is afforded the parties by said section; and if the administrator fraudulently omitted to include the amount in his reports, or to account for it, it is equally certain that a court of equity would have jurisdiction, even in the absence of any statutory provision, to grant relief against such fraud.

It is claimed, however, by defendants, that the time within which proceedings may be instituted for the correction of mistakes in the settlement is limited, by the latter clause of section 2375, to three months from the time of the settlement in which the mistake occurred; and that, as plaintiffs did not institute this proceeding for nearly two years after the final settlement in question, their right of action is barred. The provision relied on is as follows: "Accounts settled in the absence of any person adversely interested, and without notice to him, may be opened within three months, on his application." We are of opinion, however, that this provision is not applicable to a case where it is claimed the administrator, by fraud or mistake, has omitted to account for a portion of the assets of the estate.

The allegation here is that the amount in question was not contained in the accounts filed by the administrator. There has, therefore, never been a settlement as to that item. By mistake or fraud it was omitted from the accounts, and hence was not included in the settlement. Besides this, the provision of section 2474 is general. The court is empowered to correct the mistake whenever such grounds for relief are shown as will warrant the interference of a court of equity. And we think it very clear that this provision is in no manner limited by the provision of section 2475. The administrator made a partial settlement in 1874. The evidence

shows that he had then received the sum of \$554.92 as interest on debts which were owing to the estate, but this amount was not charged to him in his report; nor was it otherwise accounted for at that time. He made no further report until the time of the final settlement. In his report filed at that time he charged himself with \$50.21 as interest collected since his last report, but he made no mention of the amount of interest received by him before the former report. And the referee found that the real amount of interest collected by him between the date of his report in 1874 and the final settlement, was \$137.87 more than the amount with which he charged himself in his final report; and this finding is fully sustained by the evidence, so that he has collected the sum of \$692.74, for which he has not accounted.

At about the time of the partial settlement in 1874, the said Robert Spates was appointed guardian of plaintiffs, and at the time of his final settlement and discharge as administrator he was still acting as such guardian, and the vouchers which he filed with the clerk, after the order was made discharging him from further duties and responsibilities as administrator, were receipts signed by himself as guardian for the amounts of the distributive shares of his wards in the estate. He was, therefore, specially charged with the duty of protecting plaintiffs' interest in the final settlement of his accounts as administrator, and in the distribution of the assets of the estate.

The case, then, presents special grounds entitling plaintiffs to relief in equity. There is not only a mistake in the settlement, but, to put that construction upon the facts of the case most creditable to defendant, such mistake was occasioned by his gross negligence, and was in a matter in which he owed them a special duty.

The judgment of the circuit court awards plaintiffs separate judgments for \$98.45 each, with six per cent interest from the date of the final settlement. This amount is excessive. Alexander Arnold left a widow and seven children surviving

him. The widow is still living, but two of the children died, leaving no issue. Their interest in the estate descended to their mother, (Code, § § 2455, 2456;) and, in addition to this, she takes one-third of the amount in controversy as widow. But she is not a party to this proceeding. The widow's one-third should first be deducted from the amount, and plaintiffs are each entitled to one-seventh of the remainder, which is \$65.95, and this amount will bear interest at six per cent from the date of the final settlement. The judgment will be modified in this respect; in all others it is

AFFIRMED.

THE STATE V. HALE.

1. **Criminal Law: CHANGE OF VENUE: PREJUDICE OF JUDGE.** The statement of the mere belief of the defendant that the judge is prejudiced, when such belief is founded alone on alleged facts, of the existence of which defendant has no personal knowledge, is insufficient to overcome the presumption which arises from the denial which is implied in the order of the judge overruling the petition for a change of venue; but, with the unequivocal statement of the judge that the alleged facts on which the belief of defendant is based have no existence, the question of the correctness of the ruling is not left to depend on the presumption which arises under the law in its favor, but is affirmatively established.

65	575
94	62
65	575
148	663

Appeal from Lucas District Court.

FRIDAY, MARCH 20.

THE defendant was convicted of the crime of forgery, and sentenced to a term of imprisonment in the penitentiary, and from this judgment he appeals.

Joseph C. Mitchell and Dell Stewart, for appellant.

Smith McPherson, Attorney-general, for the State.

REED, J.—The indictment against defendant was found in

1877, but he was not arrested on the charge until in January, 1883. The arrest was made in the territory of New Mexico, and defendant was brought to this state on the requisition of the governor. Defendant was arraigned, and pleaded not guilty, and thereupon he filed a petition for a change of venue, on the ground of the alleged prejudice of the judge of the district court. This petition was overruled, and defendant then withdrew his plea of not guilty, and pleaded guilty, and the judgment appealed from was pronounced on this plea. The only question presented by the record is as to the correctness of the ruling on the petition for change of venue.

It is alleged in the petition that certain officers and employes of a railroad company in New Mexico were exceedingly hostile to the defendant; that they aided the officers of the state of Iowa, who went to New Mexico to arrest him, in effecting his arrest; and, after he was arrested and brought to this state, they wrote to the officers of a railroad company in this state, representing to them that he was a bad man, and desperate criminal, and urged them to make these statements to the judge, and inform him as to the character which defendant bore; and that these persons had approached the judge and made these disclosures to him, and by reason thereof the judge had become so prejudiced against him that he could not hope to obtain a fair trial before him. When the judge came to pass on the petition, he made a statement which, by his direction, was taken down by a short-hand reporter and made part of the record. And when the defendant was brought before the court, and the judge was about to pronounce judgment against him, he made some remarks to the prisoner, which were also taken down by the reporter and embodied in a bill of exceptions.

In his remarks, in passing upon the petition for change of venue, the judge stated that it was not true that he had been approached with reference to the case, or that any statements had been made to him calculated to prejudice him against the defendant; that he knew nothing of defendant personally,

The State v. Hale.

and had heard nothing of the case, except what had been published in the newspapers at the time of the transaction out of which it grew; that one person had written him with reference to the case after defendant's arrest, and he had received the letter, but had read it far enough only to see that it referred to a criminal case pending in the court, when he handed it to the district attorney, and gave no further attention to its contents. If this statement had not been made, and we had been left in ignorance as to the grounds on which the change of venue was denied, we still would have been compelled to presume that the ruling was made "in the exercise of a sound discretion," and "according to the very right" of the matter. The allegations in the petition of prejudice on the part of the judge are in general terms, and the alleged facts on which the belief of the defendant of the existence of such prejudice is based, are on matters of which he did not claim to have had any personal knowledge, and of which, from the nature of the case, he could hardly have had such knowledge.

The statute (Code, § 4374) requires the court, in the exercise of a sound discretion, to decide the matter of the petition according to the very right of it. And this court has frequently held that the order denying a change of venue would be interfered with only when it was made affirmatively to appear that the district court had abused the discretion thus vested in it. See *State v. Freeman*, 27 Iowa, 333; *State v. Knight*, 19 Iowa, 94; *State v. Ray*, 50 Iowa, 520; *State v. Mewherter*, 46 Iowa, 88.

It is manifest that the statement of the mere belief of the petitioner that the judge is prejudiced, when such belief is founded alone on alleged facts, of the existence of which the petitioner has no personal knowledge, is insufficient to overcome the presumption which arises from the denial which is implied from the order of the judge denying the petition. But, with the unequivocal statement of the judge that the alleged facts on which the belief of the petitioner is based

have no existence, the question of the correctness of the ruling is not left to depend on the presumption which arises under the law in its favor, but is affirmatively established.

We have also considered the remarks made by the judge when passing sentence on defendant, and we have to say that we do not find in them the slightest evidence of prejudice on the part of the judge against the prisoner. In addition to the matters which the statute (Code, § 4503) requires the judge to state to the defendant in every case, before passing sentence upon him, the judge on this occasion made some remarks on the circumstances of the offense of which defendant admitted he was guilty, and also stated the reasons which impelled him to pronounce against defendant the particular penalty which the judgment imposes upon him. Although the statute does not require this to be done, we believe it is a common practice in many of the districts of the state, and there is certainly no impropriety in it; and on the occasion in question the judge said nothing which evinced the slightest feeling of prejudice against the prisoner.

We have not had the aid of argument by counsel in this case. We have, however, examined the record with care, and we find no reason for disturbing the judgment of the district court; and it is therefore

AFFIRMED.

VAUGHN V. SMITH ET AL.

65	579
105	500

- 1. Statute of Frauds: PROMISE TO PAY ANOTHER'S DEBT: FACTS SHOWING NO CONSIDERATION.** Where plaintiff had a claim and a right to a mechanic's lien against M. & N., and defendants promised that if he would not commence proceedings, nor file any mechanic's lien to secure his claim, before a certain date, they would pay the claim, and plaintiff accepted the proposition, and defendants then paid part of the claim, but refused to pay the remainder when it became due by the terms of the proposition, but plaintiff neither released the original debtor nor relinquished his right to a lien, *held* that plaintiff parted with nothing in consideration of defendants' promise, and the promise, being to pay the debt of another, and not being in writing, was within the statute of frauds, and could not be established by oral testimony.

Appeal from Union District Court.

FRIDAY, MARCH 20.

THE plaintiff claims to recover for work and labor done in the construction of the Leon, Mt. Ayr & Southwestern Railroad. The defendants, C. H. Smith & Co., were the contractors. They sublet a portion of the work to McPherson & Neely, who sublet to the plaintiff. McPherson & Neely are indebted to the plaintiff for the work so done. The plaintiff in this action seeks to recover of Smith & Co., on the following grounds stated in an amended petition: That plaintiff was insisting that defendants, Smith & Co. and McPherson & Neely, should pay his claim for labor, as set out in his petition, and was about to commence an action to recover the same, or to file a mechanic's lien therefor; and then and there C. H. Smith, in his own behalf, and in behalf of C. H. Smith & Co., verbally agreed that if plaintiff would not commence any proceedings, nor file any mechanic's lien to secure his claim, before October 20, 1879, then they, C. H. Smith & Co., would pay plaintiff the sum of five hundred dollars on his claim, and the balance of his claim on or before October 21, 1879; that the plaintiff then and there accepted the proposition of said C. H. Smith & Co., and C. H. Smith

then paid \$500 on said claim, and plaintiff, relying upon said agreement, did not file his mechanic's lien, nor commence any suit, until after the twentieth day of October, 1879. Issue was joined on the foregoing verbal promise, and there was a trial by jury. Verdict and judgment for the plaintiff, and defendants appeal.

Laughlin & Campbell and *McDill & Sullivan*, for appellants.

J. L. Brown, for appellee.

SEEVERS, J.—It will be observed that the plaintiff did not allege in his petition that, in consideration of the promise of Smith & Co., he had lost his lien, or that he had released McPherson & Neely. Nor was there any evidence tending to show that he did so. On the contrary, the evidence tended to show that he filed his lien on the twenty-fourth day of October, 1879, and that he finished his contract in the month of September, and the court instructed the jury that the plaintiff had until the thirtieth of October to file his lien. There was evidence tending to establish the promise alleged in the petition, to which the defendants, Smith & Co., objected, on the ground that the promise was to "pay the debt of another, and not in writing;" but the objection was overruled and the evidence admitted, and the ruling of the court is assigned as error.

It will be assumed that the plaintiff was entitled to a mechanic's lien on the road, and that he delayed to file it, and to give the notice required by law, until after the twentieth day of October. The debt for which the plaintiff could establish the lien was due from McPherson & Neely. Smith & Co. were in no manner bound for the debt prior to the agreement to pay. Is such promise within the statute of frauds? In *Brightman v. Hicks*, 108 Mass., 246, it was said "that when property subject to a lien is transferred by the debtor to a third person, the latter is not liable to an action by the

creditor, unless he has made a direct promise either to the debtor or the creditor to pay the debt, and that such a promise to a creditor who neither gives up his claim against the original debtor, nor any lien upon the property, is a promise to answer for the debt of another, and must be in writing in order to satisfy the statute of frauds." See, also, *Weisel v. Spence*, 59 Wis., 301; *Stewart v. Campbell*, 58 Me., 439; *Nelson v. Boynton*, 44 Mass., 396; *Mallory v. Gillett*, 21 N. Y., 412.

As the plaintiff, in consideration of the promise, did not waive his lien, we are of the opinion that there was no new and independent consideration for the promise, and that, therefore, it is within the statute of frauds. The court, therefore, erred in the admission of oral evidence to establish the promise, and in refusing to grant a new trial on the ground that the evidence was insufficient to sustain the verdict. There was evidence tending to show that Smith & Co. had given a bond to the railway company "as a protection against all liens filed," and counsel for the appellee insist that, this being so, the debt Smith & Co. promised to pay was their own, and therefore the promise is not within the statute. It is said that the plaintiff could have maintained an action on the bond under the rule established in *Jordan v. Kavanagh*, 63 Iowa, 152, and *Baker v. Bryan*, 64 Id., 561.

It is sufficient to say that the bond is not before us, nor do we know its terms and conditions. We cannot say that the plaintiff could maintain an action thereon, nor can we see, under the authorities above cited, that this fact is material, unless the plaintiff, in consideration of the promise, released or thereby lost his lien or right of action on the bond.

REVERSED.

BAXTER & RULE V. BISHOP ET AL.

65 588
112 281

1. **Contract by Letter:** WHAT NECESSARY TO CONSTITUTE. To constitute a contract by correspondence, one letter must contain a distinct proposition, and the answer must be an unqualified acceptance. The evidence in this case (see opinion) does not establish such a contract. }

Appeal from Ida District Court.

FRIDAY, MARCH 20.

THE plaintiffs brought this, their action in attachment, against the defendant Bishop, and garnished the defendant Williams, who had money in his hands realized upon a sale of cattle and hogs belonging to Bishop. Palmer & Richman intervened, setting up a claim upon the money. The cause as between the plaintiffs and intervenors came on for trial as an action in equity, and a decree was rendered dismissing the petition in intervention as against the plaintiffs. The intervenors appeal.

John S. Monk, for appellants.

Rollins & Bradshaw, for appellees.

ADAMS, J.—The intervenors averred, in substance, in their petition in intervention, that prior to January 1, 1883, they were engaged in business as commission men in the city of Chicago; that in the latter part of 1882 they, as commission men, advanced money to the defendant, Bishop, with which to buy cattle and hogs for their mutual benefit,—such cattle and hogs to be assigned to them at their place of business in Chicago; that Bishop used the money advanced by them in buying cattle and hogs, which were not shipped to them, but sold, and the proceeds constituted the fund in controversy. They averred, in substance, that they had an equitable lien upon the cattle and hogs by virtue of their advancement of the money to purchase them, and by virtue of the agreement

that they should be assigned to the intervenors at their place of business, and that the plaintiffs had notice of the intervenors' lien; and that they have an equitable right to the fund derived from the proceeds, superior to the plaintiffs' attachment.

The plaintiffs, for answer to the petition in intervention, denied that there was any agreement on the part of Bishop to assign the cattle and hogs to the intervenors.

Several interesting questions of law are discussed by counsel in their argument, but, in the view which we have taken of the case, it will be sufficient for its disposition to determine a single question of fact. Does the evidence show an agreement on the part of Bishop to assign the cattle and hogs to the intervenors? We have examined the evidence with care, and we have to say that we think that it fails to show such agreement. The evidence upon this point is very brief, and we will set it out in full. On November 1, 1882, Bishop wrote to the intervenors in these words: "DEAR SIRS: Are you still willing to hold good your former proposition to honor draft for me for one-half cost car of stock in advance? Hogs will be the principal shipment." The agreement relied upon by the intervenors is alleged to be in writing, and composed of the letter above set out, and the intervenors' reply thereto. But the letter in reply was not introduced in evidence. One of the intervenors testified as a witness, but testified merely that Bishop's letter was replied to. Bishop, however, testified in these words: "They accepted the proposition in a letter to him. Stock to be shipped to them; I purchased with money." This is all the evidence there is as to the contents of the writings which the intervenors rely upon as constituting the agreement between them and Bishop. Contracts may be made by correspondence, but to constitute a contract by correspondence one letter must contain a distinct proposition, and the answer must be an unqualified acceptance. 1 Pars. Cont., 476; *Vassar v. Camp*, 11 N. Y., 441.

Lowrie, Bowman & Boyer v. Ryland & Troutman et al.

Now it seems to us impossible to find a contract from what is contained in Bishop's letter, and from anything that is shown in relation to the intervenors' reply thereto. In the first place, Bishop's letter does not contain any proposition. It refers to a former proposition by the intervenors to honor Bishop's draft. If there was anything to be done by Bishop, he was yet to be bound, either by some distinct proposition as to what he would do, and by acceptance thereof by the intervenors, or by a proposition on their part and acceptance by Bishop. This transaction, so far as the written part is concerned, never seems to have gone beyond a proposition contained in the intervenors' reply. There is no pretense that Bishop ever accepted the proposition in writing. What obligation, if any, arose on Bishop's part by implication from what was done, we need not enquire. The intervenors not only declared upon a written agreement, but they declared that Bishop's letter and their reply constituted the agreement. We are not able to hold that those writings constituted an agreement, and the judgment must be

AFFIRMED.

LOWRIE, BOWMAN & BOYER V. RYLAND & TROUTMAN ET AL.

1. **Will; CONSTRUCTION: LIFE-ESTATE OR FEE-SIMPLE.** The following language used in a will: "I will, devise and bequeath all the residue of my estate to my wife, Cynthia A. T.; that is to say, subject to the payment of my debts, and the legacies heretofore named to the children of my first wife, Hannah T., deceased. I give and devise to my present wife, Cynthia A., all my estate, and all of which I may die seized or possessed, to be by her held, owned and possessed during her natural life; and at her death it is my will, wish and desire that it shall descend to her own children, S. S. T. and A. T., share and share alike; and I hereby will and bequeath it to them, subject to the devise hereinbefore made to my said wife, Cynthia A., and subject to all just rights by virtue of such devise,"—*held* to give to Cynthia A. only a life-estate in the property.

Appeal from Van Buren Circuit Court.

FRIDAY, MARCH 20.

THE plaintiffs brought this, their action in attachment, against the defendants Ryland & Troutman, and levied upon certain real estate in the town of Bonaparte, Van Buren county. Cynthia A. Troutman intervened, claiming to be the owner in fee-simple of the property levied on. Her claim, as shown by her petition, was based upon the will of her deceased husband, G. W. Troutman, who died seized of the property in question. The plaintiffs demurred to her petition in intervention, and the court sustained the demurrer. She elected to stand upon her petition, and judgment was rendered against her. She appeals.

Lea, Wherry & Walker, for appellant.

Craig, Collier & Craig and *G. W. Adams*, for appellees.

ADAMS, J.—The question presented is as to the construction which should be placed upon G. W. Troutman's will. The intervenor was made a devisee, and it is conceded that under the will she took an interest in the property, and the question presented is as to whether she took a life-estate or a title in fee-simple. She contends that she took a title in fee-simple. The part of the will upon which it is necessary to put a construction is in these words: "I will, devise and bequeath all the residue of my estate to my wife, Cynthia A. Troutman; that is to say, subject to the payment of my debts, and the legacies hereinbefore named to the children or heirs of my first wife, Hannah Troutman, deceased. I give and devise to my present wife, Cynthia A., all my estate, and all of which I may die seized or possessed, to be by her held, owned and possessed during her natural life; and at her death it is my will, wish and desire that it shall descend to her own children, Stephen Scott Troutman and Albert Troutman, share and share alike; and I hereby will and bequeath it to them, subject to the devise hereinbefore made to my said wife, Cynthia A., and subject to all her just rights by virtue of such devise."

The words, "I will, devise and bequeath all the residue of my estate to my wife, Cynthia A. Troutman," would, if taken alone, be sufficient to give her a fee-simple title. We say further that if these words could have no other meaning, we might feel constrained to give them that meaning, notwithstanding the qualifying words which follow. It has been held, for instance, that where the first taker has power to dispose of the property, he must be considered the absolute owner, notwithstanding any provision there may be for a limitation over. The power to dispose of the property is inconsistent with any other than an absolute ownership. But the words, "I will, devise and bequeath," might give a qualified ownership, and will be held as giving only such, if the context is such as to show that such was the testator's intent. In the case at bar, the testator seemed desirous of providing that the devisee should not have power to dispose of the property. It was given to her to be "held, owned and possessed during her natural life." It is true that these words are followed by a provision that the property shall at her death *descend* to her children, and strictly, if she took only a life-estate, nothing could at the time of her death descend to her children. But it is manifest, taking the will all together, that the testator did not use the word "descend" with technical accuracy, meaning, doubtless, merely that at the death of his wife the right of possession and enjoyment should pass to the children, and their ownership should then become unqualified.

We reach the conclusion, then, that none of the words used are necessarily inconsistent with the idea that the testator's intention was to give his wife a life-estate. This being so, we are at liberty to give full force to the provision whereby the testator devised the property to his children, subject to the devise made to his wife. We think that her petition in intervention failed to show that she was the owner in fee-simple, as she claimed to be, and that the demurrer was properly sustained.

AFFIRMED.

RICHARDS V. LOUNESBURY.

1. **Practice in Supreme Court: EVIDENCE TAKEN IN SHORT-HAND: HOW CERTIFIED.** Evidence taken in short-hand can become the written evidence, for the purpose of an appeal, only when it is translated, and the translation is certified by the reporter. (Code, § 3777.) The certificate of the judge, who cannot read the short-hand notes, that they show all the evidence offered and received, cannot give them the character of written evidence.

Appeal from Jasper Circuit Court.

FRIDAY, MARCH 20.

THIS action was brought at law to recover upon a written contract. Upon motion of defendant the cause was, against plaintiff's objection, transferred to the chancery docket. Upon a trial on the merits, a judgment was rendered for plaintiff. Defendant appeals.

Alanson Clark, for appellant.

Winslow & Varnum, for appellee.

BECK, CH. J.—Plaintiff moves to strike the evidence in this case. It is shown by an amended abstract filed by plaintiff, which is not denied by defendant, that the evidence was taken by a short-hand reporter, and his notes were filed in the case. The court gave a bill of exceptions, which shows that the notes of the reporter correctly show, with the exhibits, all the evidence offered, and all the evidence received at the time. But there is no certificate of the court or judge to the transcript of the notes. The reporter does not certify to the translation of the notes. We think, by reason of this fact, the evidence cannot be considered here. Surely the reporter, who probably alone can correctly read the notes, ought to certify to the translation; and the certificate of the judge, who cannot read them, ought not to be regarded as alone sufficient. The statute provides that the notes "may

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78	299
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103	545

Perry v. Conger & Norris.

be referred to in any bill of exceptions, and when transcribed and *certified*, shall be inserted therein on appeal." Code, § 3777. This language evidently contemplates the certification of the transcript or translation of the notes. *Ross v. Loomis*, 64 Iowa, 432, is in harmony with this conclusion, holding that a translation of the notes, certified by the reporter, sufficiently presented the evidence. It is plain that the certificate of the judge, who cannot read the notes, cannot give them the character of written evidence in the case. Evidence taken in short-hand can only become the written evidence when translated, and the translation is certified to by the reporter.

We think the motion of the plaintiff to strike the evidence ought to be sustained. This ends the case, as there are no errors assigned, and, indeed, none are argued, except those based upon the evidence. The judgment of the circuit court must be

AFFIRMED.

PERRY V. CONGER & NORRIS.

1. **Appeal from Justice's Court: JURISDICTION OF CIRCUIT COURT: AMOUNT IN CONTROVERSY.** A cause appealed from a justice's court stands in the circuit court, as to the amount in controversy, just as it did in the justice's court. (Code, § 3590). So, where the action was for \$24.50, and there was a counter-claim for \$30, and upon trial the only judgment rendered by the justice was against plaintiff for costs, from which he appealed, *held* that the amount in controversy was that shown by the pleadings, and not the amount of the judgment, and that, the amount in controversy being more than \$25, the circuit court had jurisdiction of the appeal, under § 3575 of the Code.

Appeal from Poweshiek Circuit Court.

FRIDAY, MARCH 20.

THIS action was originally commenced before a justice of

Perry v. Conger & Norris.

the peace, where judgment was rendered against plaintiffs, who appealed to the circuit court. On motion of defendants the circuit court dismissed the appeal, upon the ground that the amount in controversy did not exceed \$25. The plaintiff appeals to this court.

Haines & Lyman, for appellant.

William H. Briggs, for appellee.

BECK, CH. J.—I. The amount in controversy, as shown by the pleadings, being less than \$100, the cause is brought here upon a certificate presenting the following question of law for determination: "Where plaintiff brings an action before a justice of the peace, asking judgment for 24 and 50-100 dollars, as the value of property converted by defendants, and defendants answer by general denial, and also plead a counter-claim for services rendered plaintiff to the value of thirty dollars, for which sum defendants ask judgment, which counter-claim is denied by plaintiff, and on the trial the justice renders judgment against plaintiff for costs, from which judgment plaintiff appeals, and in the circuit court defendants move to dismiss the appeal on the ground that the amount in controversy does not exceed twenty-five dollars, is the plaintiff entitled to an appeal under section 3575 of the Code, and has the circuit court jurisdiction of the appeal?"

II. Code, § 3575, provides that "no appeal shall be allowed in any case (from a justice of the peace) when the amount in controversy does not exceed twenty-five dollars." It cannot be doubted that the amount in controversy in the case, before the judgment was rendered, was more than twenty-five dollars. The defendants denied the right of plaintiff to recover upon his cause of action, and claimed to recover thirty dollars upon their counter-claim. Clearly thirty dollars were in controversy, if not more.

"An appeal brings up a case for trial upon the merits, and

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for no other purpose." Code, § 3590. The trial, of course, is upon all issues raised by the pleadings. The case, therefore, stood upon the appeal, as to the amount in controversy, just as it did before the justice of the peace. In each court the defendant could have recovered a judgment for thirty dollars. By appealing, the plaintiff recognized the right of defendant to recover such a judgment in the circuit court, if the proof should demand it. *Lundak v. The Chicago & N. W. Ry Co.*, ante p. 473. It therefore clearly appears that the amount in controversy, both before and after the appeal from the justice of the peace, exceeded twenty-five dollars.

It is our opinion that the circuit court erred in dismissing the appeal.

REVERSED.

65	590
82	13

THE IND. DIST. OF MOUNT VERNON V. THE IND. DIST. OF
HARRIS GROVE ET AL.

1. **Independent School Districts: DIRECTORS CANNOT CHANGE BOUNDARIES OF.** *Eason v. Douglass*, 55 Iowa, 390, followed.
2. **Practice in Supreme Court: RIGHTS OF APPELLER.** One who has not appealed cannot be heard to object to any part of the judgment appealed from.

Appeal from Harrison District Court.

FRIDAY, MARCH 20.

IN 1873 the boundaries of the plaintiff and defendant districts were changed by the action and concurrence of their respective boards of directors. The plaintiff claims that such action is void, because no such power has been conferred by statute on the directors of independent districts. The defendant has received certain taxes levied on the territory set over to it by such change of boundaries, and the plaintiff brought

Pontius v. Winebrenner.

this action to recover the same. The defendant pleaded a counter-claim, for the tuition of certain children who attended school in the defendant district, for whose tuition the plaintiff was bound to pay. Trial to the court, and a judgment rendered that the plaintiff was entitled to recover the taxes, and also that defendant was entitled to recover on its counter-claim. The defendant appeals.

J. W. Barnhart, for appellants.

Smith & Clyde, for appellee.

SEEVERS, J.—The principal question presented in the record was determined by this court in *Eason v. Douglass*, 55 Iowa, 390. Following that case, the judgment of the district court must be affirmed. Counsel for the appellee insist that the court erred in finding for the defendants on the counter-claim. It is sufficient to say that the plaintiff has not appealed, and that the appellant is content with the finding on the counter-claim, in the event the judgment of the district court is affirmed on the other branch of the case.

AFFIRMED.

PONTIUS V. WINEBRENNER. (Two cases.)

1. **Constitutional Law:** CHAP. 143, LAWS OF 1884. *Littleton v. Frits*, ante, p. 488, followed.

Appeal from Marshall District Court.

FRIDAY, MARCH 20.

PLAINTIFF brought these actions to restrain the defendant from carrying on the business of selling intoxicating liquors in a building and place occupied by him as a saloon, in the city of Marshalltown. The petitions were presented to the

Pontius v. Winebrenner.

judge of the district court, who, after notice to defendant, and a hearing thereon, granted a temporary injunction restraining defendant from carrying on said business, and from this order defendant appeals.

Parker & Childs, for appellant.

Caswell & Meeker, for appellee.

REED, J.—The cases are in all respects like that of *Littleton v. Fritz*, ante, p. 488, and, following that case, the judgments appealed from are

AFFIRMED.

REPORTS
OF
Cases in Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA,
AT
DAVENPORT, APRIL TERM, A. D. 1885,
IN THE THIRTY-NINTH YEAR OF THE STATE.

PRESENT:

HON. JOSEPH M. BECK, CHIEF	JUSTICE,
" AUSTIN ADAMS,	
" WILLIAM H. SEEVERS,	
" JOSEPH R. REED,	} JUDGES.
" JAMES H. ROTHROCK,	

FORCHEIMER & Co. v. STEWART.

1. **Sale: DELIVERY TO CARRIER: BILL OF LADING TO VENDOR: ASSIGNMENT TO AND PAYMENT BY VENDEE WHILE GOODS ARE IN TRANSITU: WHEN TITLE PASSES: RISK OF DAMAGE.** Where a vendor delivered goods to a carrier for transportation, and took a bill of lading to himself, which he endorsed in blank, and attached to a sight draft on the vendees, and then deposited the bill of lading with the draft in the bank, and got credit on his bank account for the amount of the draft, and the draft and bill of lading being forwarded, the vendees paid the draft and accepted the endorsed bill of lading while the goods were yet *in transitu*, *held* that the goods were not delivered, and that the title did not pass, until the bill of lading had been delivered to the vendees; but that, after that time, in the absence of a contract to the contrary, the risk of damage to the goods by the elements was assumed by the vendees.

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65	593
131	252
65	593
134	258

2. —: OF GOODS BY AGENT TO BE DELIVERED: WARRANTY AS TO QUALITY: FACTS CONSTITUTING. Where defendant, in Council Bluffs, Iowa, appointed a broker in Mobile, Alabama, to sell hams, and the agent took plaintiffs' order for "choice, sugar-cured, canvassed hams," and plaintiffs had no opportunity to inspect the hams, but they were to be shipped from Council Bluffs, and defendant shipped the same and demanded and received payment therefor while they were in transit, held that the facts amounted to a warranty that the hams shipped were "choice, sugar-cured, canvassed hams."

Appeal from Pottawattamie District Court.

TUESDAY, APRIL 7.

ACTION to recover upon an alleged breach of warranty in a contract of sale of a certain lot of hams. There was a trial to a jury, and verdict and judgment were rendered for the defendant. The plaintiffs appeal.

Sims & Cadwell, for appellants.

Sapp & Pusey, for appellee.

ADAMS, J.—The plaintiffs are provision dealers residing and doing business in the city of Mobile, Alabama. The defendant is a pork-packer residing and doing business in the city of Council Bluffs, Iowa. In August, 1881, he entered into a contract through his broker, one O. Wilson, located at Mobile, for the sale of a large quantity of hams, and shipped the same on the nineteenth day of that month. The hams arrived in Mobile in due course of transportation, and in about ten days. The plaintiffs had paid for them on the twenty-fourth of that month, and while the same were in transit. They aver that they purchased the hams as "choice, sugar-cured, canvassed hams," and that when the same were delivered to them they were unsound, tainted and unmerchantable. They introduced evidence tending to show that the hams, without their fault and without the fault of the carrier, had, upon their arrival at Mobile, become sour, tainted and skippery. They also introduced expert evidence tending

to show that hams properly cured, and properly treated afterwards, will keep through the summer months, and that, too, though transported to a southern market like Mobile; and that if they are choice hams they will keep even longer than that.

The defendant, on the other hand, introduced evidence tending to show that the hams were properly cured, and were in good condition when shipped at Council Bluffs. As to when, if at all, the hams became unsound, there was no direct evidence whatever. As will be seen, it became important to determine with what warranty, if any, the hams were sold and delivered, and if with a warranty, whether the hams delivered were of the quality warranted at the time they were delivered; and in this inquiry it will be seen that there was involved another, and that is as to the time when the hams should be deemed to have been delivered. The plaintiffs contend that there was an express warranty that the hams were choice, sugar-cured, canvassed hams. The defendant denied that there was any express warranty. Again, the plaintiffs contend that the delivery to them took place when the hams were received by them from the carrier at Mobile. The defendant contends that the delivery to them took place when the hams were delivered to the carrier at Council Bluffs. Respecting this matter of delivery, the undisputed fact appears to be that the defendant took from the carrier a bill of lading, or shipping receipt, in his own name, whereby the hams were made deliverable to him or his order. This bill of lading the defendant indorsed in blank; to it he attached a sight draft, which he drew upon the plaintiffs, for the purchase price of the hams, and delivered the same to his banker in Council Bluffs in the usual way of such business, and received credit therefor in his bank account. The draft and bill of lading were forwarded by the bank to its correspondent in Mobile, and by the latter were presented to the plaintiffs, who, after some hesitation and negotiation, paid the draft and received the bill of lading.

I. Upon this state of facts the court instructed the jury in these words: "When the bill of lading was delivered to the plaintiffs, the property in the merchandise was vested in them, and the carrier who had it in possession for transportation was their agent, and the delivery of the goods was completed at that time, and the inquiry must be whether at that time the goods corresponded in quality with the warranty." The giving of this instruction is

1. SALE: delivery to carrier: bill of lading to vendor: assignment to and payment by vendee while goods in transit: when title passes: risk of damage.

assigned as error. Where the shipper retains the right of disposing of the property while in the hands of the carrier, there is, of course, no delivery to the consignee. The object, usually, which the shipper has in taking the bill of lading in his own name, when he does so, is to enable him to retain such right. What the defendant's object was, there can be no doubt. He proceeded at once to transfer the bill of lading to the bank as security for the draft, the amount of which was credited to him in his bank account. There was, then, no delivery made to the plaintiffs by delivery to the carrier at Council Bluffs. The rule is very clearly expressed in *Merchants' Nat. Bank v. Bangs*, 102 Mass., 295. COLT, J., said: "If the bill of lading, or other written evidence of the delivery to the carrier, be taken in the name of the consignee, or be transferred to him by endorsement, the strongest proof is afforded of an intention to transfer an absolute title to the vendee. But the vendor may retain his hold upon the goods to secure the payment of the price, although he puts them in the course of transportation to the place of destination by delivery to the carrier. The appropriation which he then makes is said to be provisional or conditional. He may take the bill of lading or carrier's receipt in his own or some agent's name, to be transferred on payment of the price, by his own or his agent's indorsement, to the purchaser, and in all cases, when he manifests an intention to retain this *jus disponendi*, the property will not pass to the vendee." See also, *Benj. Sales*, § 399, and cases cited.

Having reached the conclusion that the goods were not delivered by the defendant to the plaintiffs by delivery to the carrier at Council Bluffs, we come to inquire whether they were delivered by delivery to them, later, of the indorsed bill of lading. In our opinion they were. The defendant, from the time of such delivery, had no right or interest in the goods, and the *jus disponendi*, or right of disposing of the goods, had become absolute in the plaintiffs. The goods could not be sold nor incumbered by the defendant, nor properly taken upon attachment or execution by his creditors. This being so, it would seem to follow that the risk of damage from the elements, in the absence of any agreement to the contrary, should be borne by the plaintiffs.

It is true that the plaintiffs could not be considered as having had an opportunity to inspect the goods at the time when the transfer was made to them of the bill of lading. But we do not see how the plaintiffs' inability to inspect at that time could give the transfer of the bill of lading an effect different from what it otherwise would have had. The plaintiffs were not bound to accept the transfer at that time. The defendant had put the goods in transit without a tender of delivery. The plaintiffs might unquestionably have withheld payment of the draft and acceptance of the bill of lading until the goods reached their destination. But for reasons satisfactory to themselves they preferred to pay in advance. It was their right to do so if they preferred, and secure whatever advantages there might be from such payment and such acceptance. But in securing those advantages we think they took upon themselves whatever risk there might be of damage from the elements from that time forward.

We ought to say, in this connection, that the plaintiffs claim that they declined at first to pay the draft and accept the bill of lading, and were induced to do so at the time they did only by an agreement on the part of the defendant that he would protect them, which agreement they construe as meaning that the defendant would guaranty that the goods

should be laid down in good condition at Mobile. Some evidence was introduced for the purpose of proving such agreement. But the plaintiffs' difficulty is that they do not declare upon such agreement. They barely allude to it, and they seem to treat it as a mere circumstance, to be taken with others, as tending to show that no delivery took place until the goods reached Mobile. But the agreement, if it had any effect, merely charged the defendant with the risk of damage from the elements during the remainder of the transportation. We think that the instruction given as to the time when delivery took place was correct, and that the plaintiffs could not be aided by the agreement referred to, without setting the same up as a cause of action.

II. We come now to consider whether there was evidence tending to show a special warranty of these hams. The

2. — : of
goods by
agent to be
delivered :
warranty as
to quality :
facts consti-
tuting.

court below instructed the jury, in effect, that there was not. The hams contracted to be sold were represented by the defendant's broker, Wilson, to be "choice, sugar-cured, canvassed hams."

Wilson claimed to be authorized by the defendant to contract for the sale of such hams, by a certain letter and certain telegram received by him from the defendant. A letter and a telegram were introduced in evidence. In the letter, under date of July 11th, being that in which the broker was employed by the defendant to sell hams, the defendant, in describing his hams, said: "I have no winter product except hams, sugar-cured, canvassed. They are very fine." In the telegram defendant said: "Hams strictly choice." The court instructed the jury in these words: "The original authority which the defendant gave the broker clearly appears to have been in writing, and is contained in the defendant's letter to the broker of July 11th, which is in evidence. While this letter contains language which is commendatory of the merchandise, it does not contain authority to the broker to sell it with a special warranty."

A representation as to the quality of goods by the use of

the word "choice" may or may not be a warranty, according to circumstances. The use of such word by the seller respecting goods which the buyer was inspecting, or might be presumed to inspect, would not ordinarily be a warranty. It would be a mere expression of opinion respecting the quality, of which the buyer should judge for himself. There would be no end to litigation if all words of commendation used by sellers were construed as warranties. But there are circumstances under which it is the right of both parties that representations respecting quality made by the seller should be regarded as statements of fact which may be relied upon by the buyer. This is so where the buyer is ignorant of the quality, and cannot be presumed by the seller to inform himself or acquire knowledge of it except through the representations of the seller. But the question before us does not, to our mind, involve precisely the principle above stated. At the time Wilson made the contract in question, the goods had not been designated. It was not a contract for specific goods of the quality of which the buyers could take notice. It was a mere executory contract for goods of a certain quality, and the seller was at liberty to fill it with any goods he saw fit, provided, only, they were of the kind and quality contracted for. The case differs in no essential respect from one where the buyer makes an order for goods of a certain kind and quality, and the seller accepts the order. The obligation of the seller is to execute the contract upon his part by a selection and delivery of the goods of the kind and quality contracted for. Such contract is not in the outset a sale with a warranty; it is executory. It becomes an executed sale upon delivery; and if the delivery is made under circumstances which preclude inspection, we think that a warranty arises that the goods are of the quality contracted for. If, in the case at bar, the plaintiffs contracted for "choice, sugar-cured, canvassed hams," the defendant was bound to select and deliver such. And when he drew a draft against them, and caused the draft to be presented, and he accepted payment

thereon at a time when the goods were in transit, we think that a warranty arose that the goods thus shipped and drawn against while in transit were of the quality contracted for.

What the defendant's communications to his broker were concerning the quality of hams which he desired to offer through him in the Mobile market, we think that there was no doubt. But we do not desire to rest our decision expressly upon these communications. It is enough for us to know that the defendant constituted him his agent at Mobile to take orders for, and contract to sell, hams; and the order which the agent took from the plaintiffs was for choice sugar-cured, canvassed hams. No one would claim that, where a principal should appoint an agent to contract for the sale of wheat, and such agent should contract for the sale of No. 1 wheat, the contract could be properly executed by the delivery of an inferior grade. An agent appointed to contract for the sale of hams is clothed with apparent authority to contract for the sale of at least the usual grades known in the market, and especially for the sale of such a grade as that in question, where the hams are to be shipped, in summer, to a distant southern market. It would be a reproach to the law to hold that a seller, under the circumstances shown, was not bound to fulfill his agent's contract as made. Neither buyers nor sellers desire such rule established as that contended for. It would go far towards destroying all confidence in an important mode of trade. In our opinion, then, the instruction which the court gave, to the effect that there was no special warranty, cannot be sustained. Nor do we think that the instruction given was without prejudice. It is true that, under other instructions, the jury must have found that the hams were merchantable on the day the bill of lading was accepted by plaintiffs. But the plaintiffs contracted for a superior grade, and the evidence tended strongly to show that, if the hams had been of such a grade, they would not have been unsound, tainted and skippery on the day they arrived.

REVERSED.

DAVIS, GOULD & CO. v. DANFORTH & CO.

65	601
107	590
65	601
111	125

1. **Sale:** UPON ORDER GIVEN TO AGENT: FAILURE OF AGENT TO TRANSMIT CONDITION AS TO WARRANTY: LIABILITY OF PRINCIPAL. Where plaintiffs' agent, who was authorized to take orders for wagons and carriages and transmit them to plaintiffs, took defendants' order, but defendants, not being content with plaintiffs' printed and published warranty, demanded a further warranty, whereupon a warranty was written out by the agent in duplicate, one copy of which was left with the defendants, and the other of which the agent agreed to forward with the order to his principals, for their acceptance or rejection; and he sent the order, but failed to send the warranty, and plaintiffs forwarded the wagons and carriages without any knowledge of the written warranty, and the goods did not fulfill the conditions thereof, *held* that plaintiffs were liable to the same extent as if the goods had been sold by them upon that warranty.

ADAMS, J., *dissenting*.

2. **Evidence:** WRITTEN CONTRACT: ORAL TESTIMONY EXCLUDED: ERROR CURED. Where the court erred in admitting oral testimony of a contract afterwards reduced to writing, *held* that the error was not ground for reversal, where the court afterwards instructed the jury that, if the contract was reduced to writing, no recovery could be had on the oral statements made prior to the writing.
3. **Instructions:** MUST BE PERTINENT TO ISSUES. Certain instructions asked in this case, being based on a wrong theory of the issues, were properly refused.

Appeal from Decatur District Court.

TUESDAY, APRIL 7.

PLAINTIFFS brought this action to recover a balance alleged to be due them for certain carriages and wagons sold by them to defendants. Defendants admitted the sale and delivery to them of the property described in the petition, but as a counter-claim they alleged that the property was sold by plaintiff with a warranty of its quality, and that there was a failure of such warranty, whereby they were damaged in a large amount. Defendants recovered on their counter-claim, and plaintiff appeals.

Brockett & Young, for appellants.

Laughlin & Campbell, for appellees.

REED, J.—I. Plaintiffs are engaged in the business of manufacturing wagons and carriages at Cincinnati, Ohio, and defendants reside at Mt. Ayr, in this state, and are merchants engaged in the purchase and sale of goods of that class. An agent of plaintiffs called on defendants at their place of business, and solicited them to make a purchase from his principal, and they accordingly executed and delivered to him an order for the goods in question. This order was sent by the agent to plaintiffs at Cincinnati, and they shipped the goods to defendants by rail. The agent, at the time he received the order, had in his possession plaintiffs' printed catalogue and price-list, in which was printed what purported to be the warranty which they gave in the sale of their goods. This warranty was shown to defendants; but their claim is that they did not purchase the goods in question under this warranty, but that the agent, at the time the order was given, gave them a written warranty of the quality of the goods, which was much broader in its terms than the printed warranty contained in the catalogue.

The evidence shows, without any conflict, that defendants were unwilling to purchase the goods with the warranty contained in the catalogue, and that the agent proposed to write out and transmit to plaintiffs with the order a warranty of the quality of the goods which would be satisfactory to defendants; and this was assented to, and the agent accordingly did write such warranty in duplicate, and left one copy with defendants, and promised to transmit the other copy, with the order, to plaintiffs; and it was agreed between the agent and defendants that the order and warranty should be subject to plaintiffs' approval and acceptance, and that if they accepted the order the goods should be sold under said written warranty.

The agent, however, did not transmit the written instrument, but sent the order alone. It is shown that the agent had power to solicit orders for goods and transmit them to plaintiffs, but it does not appear that he had authority to make sales of goods. It does not appear that defendants had any knowledge that the agent had not sent the written warranty with the order, until after they had received the goods and disposed of a portion of them.

Plaintiffs objected to all evidence of the written warranty, on the ground that it was not shown that the agent had any authority to bind them by a contract of that character. But this objection was overruled, and the evidence was admitted. This ruling is now assigned as error. The satisfactory answer to the objection is that the agent did not assume to bind plaintiffs by any contract. He did not undertake either to sell the goods or to give any warranty of their quality. He had authority, however, to solicit defendants' order and transmit it to plaintiffs for their acceptance or rejection, and when they gave him the order, and consented that it and the written warranty might be transmitted to plaintiffs, they thereby offered to purchase the goods with that warranty; but they did not offer or consent to make the purchase on any other terms. When they received the goods, they had every reason to believe that the terms of their offer had been accepted by plaintiffs; and they disposed of a portion of the goods in that belief.

When the agent transmitted the order, he was acting within the scope of his employment, but in withholding the written warranty he perpetrated a fraud. It was his duty to transmit to his principals for their acceptance or rejection the very offer which defendants had made; but, by transmitting the order alone, he led them to believe that defendants' offer was materially different from what it actually was, and they shipped the goods in that belief.

Defendants' offer was to purchase the goods upon certain terms, and plaintiffs were led to ship them in the belief that

the offer was materially different. But they were led into this error by the fraud of their agent, and, as either they or defendants must suffer in consequence of this fraud, the law puts the burden of the loss upon them. 1 Pars. Cont., 73, 74. The relations and rights of the parties, therefore, are not different from what they would have been if the offer actually made by the defendants had been communicated to and accepted by plaintiffs. They are held to have accepted it as it was actually made. The validity of the written warranty, then, did not depend upon the question of the agent's power or authority to make it.

II. A witness who was present when the order was executed was permitted, against plaintiffs' objection, to detail the statements made by plaintiffs' agent during the negotiation with reference to the quality of the carriages manufactured by plaintiffs. This evidence ought not to have been admitted. As the warranty was in writing, all contemporaneous and prior representations as to the quality of the goods were merged in the written instrument. But in an instruction subsequently given the jury were told, in effect, to disregard this evidence. They were told that if the warranty was reduced to writing there could be no recovery on any parol representations made prior to the making of the written warranty. With this instruction, we think plaintiffs could not have been prejudiced by the parol evidence.

III. Plaintiffs objected to certain evidence which was offered for the purpose of establishing a failure of the warranty. The ground of the objection was that the evidence had no tendency to prove a failure of the warranty contained in the printed catalogue. But it did have a tendency to prove a failure of the written warranty; and, as the rights of the parties were to be determined with reference to that instrument, the evidence was properly admitted.

IV. Plaintiffs asked the court to give the following instructions, and its refusal to give the same is assigned as error:

2. EVIDENCE:
written contract: oral
testimony excluded: error
cured.

3. INSTRUCTIONS: must be pertinent to issues.

“(1) The jury are instructed that it is a rule of law that a person dealing with an agent, or one claiming to be such, is bound, at his peril, to see that the agent has authority to bind his principal in such transaction, or that the agent is acting within the scope of his apparent authority. (2) An agent authorized to sell goods with a printed warranty, the legal presumption would be that he was authorized to make sales upon the terms and conditions therein contained, and not otherwise. Being authorized to sell, and the terms on which the plaintiffs sold the goods being published in a printed document, there would be no presumption that the agent was empowered to go outside those printed terms in making a contract.” These instructions were asked on the theory that the contract of warranty, under which defendants were seeking to recover, was made by plaintiffs’ agent. But, as we have seen, this is not correct. The agent did not assume either to sell the property, or to bind plaintiffs by a warranty of its quality. All he undertook to do was to transmit defendants’ offer to purchase to his principal. The instructions, therefore, have no application to the facts of the case.

The foregoing discussion disposes of all questions presented by the record. We see no ground for disturbing the judgment of the district court, and it is accordingly

AFFIRMED.

ADAMS, J., *dissenting*. I am not able to see how a recovery can properly be had upon the alleged warranty. The plaintiffs never saw nor heard of the warranty, and certainly did not make it, unless through the alleged agent; but he did not make any warranty. He did not have the power to warrant, and did not claim to have. He did not even have the power to make a sale. He had no power, except to take orders, and the defendants had no reason to suppose that he had. If they desired goods different from those specified in the catalogue, or a different warranty, they should have so

provided in their order, because the agent had no authority to do more than to transmit their order. What he undertook to do outside of what he was employed to do, he undertook for the defendants. If the agent had assumed the power to warrant, and the plaintiffs had done anything by which his act was ratified, the case would be different. *Eadie v. Ashbaugh*, 44 Iowa, 519. But I have seen no case where a person has been held bound by a warranty which he never saw nor heard of, and which no person ever assumed to have the power to make as his agent. We held in *Baudouine v. Grimes*, 64 Iowa, 370, that there could be no ratification of an act in which the agent did not undertake to bind his principal.

65	606
101	169

MEYER & BRO. V. GAGE BROS. & CO.

1. **Attorney at Law: AUTHORITY TO ORDER ATTACHMENT: TRESPASS: LIABILITY OF CLIENTS.** Where a petition in attachment was signed by defendants' attorney, and sworn to by one of defendants, and the attorney ordered the levy of the writ, and they took judgment against the defendants in attachment and procured an order for the sale of the attached property, and it was sold pursuant to such order, *held* that the authority of the attorney to direct the levy, or a subsequent ratification of his act, must be presumed, and that, if a trespass was committed by such levy, defendants were liable therefor.
2. **Judgment in Attachment in Federal Court: ONE NOT A PARTY NOT BOUND BY: TRESPASS IN LEVY: RECOVERY FOR IN STATE COURTS: CONFLICTING DECISIONS.** An attachment issued by the federal court, in a cause to which plaintiffs were not parties, was levied upon property on which plaintiffs held a mortgage, valid under the decisions of this court, but invalid under a decision of the federal court from which the writ issued. *Held* that, in an action in the courts of this state by the mortgagees against the attachment plaintiffs, to recover the amount of their interest in the property seized and sold, the decisions of this court as to the validity of the mortgage should prevail, and not the decision of the court issuing the attachment.
3. **Chattel Mortgage: VALIDITY: RETENTION OF PROPERTY BY MORTGAGOR WITH POWER TO SELL.** The uniform holding of this court, (see cases cited in opinion,) that the reservation by the mortgagor of chattels

of the right to retain possession of the property, and to sell it in the ordinary course of business, does not render the mortgage fraudulent in law, adhered to.

Appeal from Mahaska District Court.

TUESDAY, APRIL 7.

THIS action was brought by plaintiffs to recover the value of their interest in certain goods which were seized and converted by defendants. It is alleged in the petition that Vickory and McQuiston, who were the owners of said goods, executed and delivered to plaintiffs a chattel mortgage thereon to secure the amount of an indebtedness which they were then owing them; and that defendants, after the execution and delivery of said mortgage, and with notice thereof, sued out a writ of attachment from the circuit court of the United States for the district of Iowa, and caused the same to be levied on said goods; and that under said levy they have carried said goods away and converted them to their own use. Defendants in their answer averred that said mortgage, under which plaintiffs claimed, was fraudulent as against the creditors of Vickory and McQuiston, for that by its terms the mortgagors reserved to themselves the right to retain possession of the mortgaged property, and sell the same at retail, according to the usual custom of merchants; and that they were permitted by plaintiffs to retain possession of said property, and deal with the same as their own, for a long time after the execution and delivery of the mortgage; and that they had it in possession at the time it was seized under the writ of attachment; and that by the law, as held by the court out of which said writ issued, said mortgage was fraudulent and void. The answer also contained a general denial. The judgment was for defendants, and plaintiffs appeal.

John F. & W. R. Lacey, for appellants.

Lafferty & Needham and *H. W. Gleason*, for appellees.

REED, J.—The case was tried to the court without the intervention of a jury. Plaintiffs introduced in evidence the mortgage referred to in the pleadings. They also proved that a portion of the debt secured by it remained unpaid. They also introduced in evidence the pleadings in the attachment suit, together with the writ of attachment and the return of the officer who served the same; also the record of the judgment in the case, and the order of the court for the sale of the attached property. It was also shown that the mortgage was duly recorded at the time of the levy, and that personal notice of the mortgage was given to the attorney of defendants, who was present at the time of the levy, and directed the officer to levy on the property in question. Defendants introduced in evidence the opinion of the circuit court of the United States for the district of Iowa, in the case of *Crooks v. Stuart*, 2 McCrary, 13. The mortgage under which plaintiffs claim the property contains the following provision: "Said grantors, or either of them, will have the right to sell said goods at retail, according to the usual custom of merchants." It was held by the circuit court of the United States, in said case, that a chattel mortgage, in which the mortgagor reserved to himself the right to retain possession of the mortgaged property and dispose of it for his own benefit, was fraudulent and void as against creditors. The district court made the following finding: "The court finds affirmatively that the mortgage to the plaintiffs from McQuiston *et al.* was valid and in good faith, and has not been paid." The judgment, however, was for defendant. It is suggested by counsel for defendants that the court may have reached this conclusion on the ground that the responsibility of defendants for the alleged wrongs was not established by the evidence.

As stated above, the marshal levied the writ on the property in question by direction of defendants' attorney. The

1. ATTORNEY
at law: au-
thority to
order attach-
ment: tres-
pass: liability
of clients.

attachment was issued on a petition, which was signed by the attorney, and verified by a member of defendants' firm. They subsequently took judgment against Vickory and McQuiston by default on this petition. They also procured an order for the sale of the attached property, and it was subsequently sold in pursuance of this order. If a trespass was committed in the levy of the attachment, there can be no question, we think, but defendants are liable therefor. On the facts proven, the authority of the attorney to give the direction for the levy, or a subsequent ratification of his act by defendants, will be presumed. And we are satisfied that the real ground upon which the holding was placed was, that the question whether defendants were guilty of a trespass in procuring the goods to be seized was to be determined by the law of the forum in which the proceedings under which they were seized were had. And as, by the former rulings of that court, mortgages like the one under which plaintiffs claimed were held to be invalid, their act of seizing the property under process would not be a trespass.

2. JUDGMENT
in attach-
ment in fed-
eral court:
one not a party
not bound
by: trespass
in levy: re-
covery for in
state courts:
conflicting
decisions.

In our opinion, this position is not sound. The suit in which the property was attached was between defendants and Vickory and McQuiston. Plaintiffs were not parties to it. Their rights could not be determined by any judgment that might be rendered in it. The validity of their mortgage was in no manner drawn in question in the suit; nor could it be in their absence. They could not be deprived of any rights which they had in the property, under a process issued against Vickory and McQuiston, in a suit to which they were not parties.

The writ of attachment authorized defendants to seize the property of Vickory and McQuiston, the parties against whom it ran. It gave them no authority whatever to seize plaintiffs' property, and it can afford them no protection if they did seize property upon it which belonged to them.

As plaintiffs' rights were in no manner determined by the proceedings in said suit, the question whether they are entitled

3. CHATTEL
mortgage:
validity: re-
tention of
property by
mortgagor
with power to
sell.

to recovery because of the seizure of said property depends entirely on whether the mortgage under which they claim is valid. The special finding of the court determines that said mortgage was not fraudulent in fact. And the uni-

form holding of this court has been that the reservation by the mortgagor of the right to retain possession of the property, and sell it in the ordinary course of business, does not render the mortgage fraudulent in law. See *Torbert v. Hayden*, 11 Iowa, 435; *Hughes v. Cory*, 20 Id., 399; *Clark v. Hyman*, 55 Id., 14; *Sperry v. Ethridge*, 63 Id., 543; *Jaffray v. Greenbaum*, 64 Id., 492. This holding is based upon the construction given to certain statutes of the state, and it has been adhered to for more than twenty years, and has become a rule of property in the state, and we see no occasion now for departing from the rule that has been thus established.

Other questions have been argued by counsel. They all relate, however, to the validity of the mortgage, and are determined by the finding of the court that it was valid. There was no appeal from that finding. Its correctness cannot, therefore, be questioned in this court.

The judgment of the district court will be

REVERSED.

Archer v. The Chicago, Burlington & Quincy R'y Co.

ARCHER V. THE CHICAGO, BURLINGTON & QUINCY R'Y CO.

65	611
101	208
65	611
102	117
65	611
112	71

1. **Statute of Limitations: NOT ENLARGED BY DISMISSION WITHOUT PREJUDICE.** Section 2844 of the Code, providing that an action may be dismissed before final submission, without prejudice to a further action, does not have the effect to enlarge the statute of limitations as to such action.
2. ———: **ACTION FOR PERSONAL INJURY: DISMISSION WITHOUT PREJUDICE: CODE, § 2537.** Where plaintiff began an action for personal injury in the state court, which defendant had removed to the federal court, and plaintiff then had it dismissed without prejudice, on the ground that he believed that he could not obtain a fair trial in the federal court, *held* that a new action for the same cause, begun more than two years after the cause of action accrued, but less than six months after the first action was dismissed, was barred by section 2529 of the Code, and that section 2537 did not save it.

Appeal from Polk Circuit Court.

TUESDAY, APRIL 7.

ON the sixteenth day of December, 1880, the plaintiff was an employe of the defendant as a brakeman, and claims that he was injured because of the negligence of the defendant in the operation of its trains. In September, 1881, he commenced an action in the circuit court to recover the damages sustained by reason of said injury. Upon the application of the defendant, that action was transferred to the federal court, and in October, 1883, the plaintiff dismissed it without prejudice. This action was commenced on the twenty-second day of December, 1883, and, in addition to a statement of the grounds upon which the plaintiff claimed he was entitled to recover, it was stated in the petition that the dismissal of the action in the federal court was not because of any negligence on the part of the plaintiff, but because he "did not believe that he would ever be able to obtain justice and a fair trial to an honest and unbiased jury in said federal court." The grounds upon which such belief was based are stated at length, but need not be repeated here. There was a demur-

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rer to the petition, on the ground that the cause of action therein stated was barred by the statute of limitations. It was sustained, and plaintiff appeals.

Bryan & Bryan, for appellant.

Runnells & Walker, for appellee.

SEEVERS, J.—I. It is provided by statute that an action may be dismissed, and that such dismissal shall be without prejudice to a further action, when the dismissal is before the final submission of the action to the jury, or to the court, when the trial is to the court. Code, § 2844. This section does not enlarge or extend the statute of limitations, but simply provides that another action may be brought and maintained, if the original action could have been brought and maintained if commenced at that time.

1. STATUTE of limitations: not enlarged by dismissal without prejudice.

II. The cause of action stated in the petition was barred in two years after it accrued, (Code, § 2529,) unless saved by section 2537 of the Code, which is as follows: "If, after the commencement of an action, the plaintiff fail therein for any cause except negligence in its prosecution, and a new suit be brought within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first." As this action was commenced within six months after the action was dismissed in the federal court, the only question to be determined is whether this action is barred by the statute of limitations.

2. — : action for personal injury: dismissal without prejudice. Code, § 2537.

It will be observed that the statute provides that if the plaintiff fails in the action another may be brought. Is the voluntary dismissal of the action such a failure as is contemplated by the statute? A voluntary dismissal under compulsion may be. For instance, it is possible that the plaintiff, without negligence on his part, may not be ready to try the case, and yet be unable to obtain a continuance; and in such

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case, if the other party insists on a trial, and the court orders it to proceed, the plaintiff might under such compulsion dismiss his action, and commence a new action, which should be deemed a continuation of the first. But suppose the plaintiff voluntarily dismisses the action for any reason, but not under any compulsion whatever, can it be said that he has failed in the action? How can it be said that he has failed until he has made at least some effort to prepare and try his action? If he fails to prepare his case for trial, and dismisses it for this reason, he is clearly guilty of negligence.

The plaintiff in the case at bar dismissed his action because he believed that he could not obtain a fair trial in the federal court. This is not a traversable fact. It cannot be tried and determined. The demurrer only admits such facts as are well pleaded. Suppose the plaintiff had proceeded to trial in the federal court, and a jury had been impaneled, and the plaintiff then concluded that he could not obtain a fair trial before such jury, and therefore dismissed his action, and then commenced this suit, could the question be determined in this action whether the plaintiff's conclusion at the time he dismissed the former action was well grounded or not? We think not; because what the plaintiff may have believed is entirely immaterial and not traversable. In our opinion, public policy would prevent such an inquiry. We deem it proper to say that it is not alleged that there was any fraud or corruption on the part of the federal court; but because of the existence of matters which, if brought to the attention of the court, could and would have been corrected or punished as a contempt, the plaintiff conceived the belief that a fair trial could not be had in such court. If it be conceded that he was correct, it is simply his misfortune. The case was legally in the federal court for trial, and the defendant had the legal right to have it tried in such court. If the plaintiff can be permitted to say that he believes he cannot have a fair trial in that court, the defendant, with equal propriety, could say that it could not obtain a fair trial in the state court. And

The State v. Melick.

it may well be assumed that the parties, unless compelled by law to do so, would never agree on a tribunal and have the cause tried.

AFFIRMED.

THE STATE V. MELICK.

1. **Criminal Evidence: ARSON: TRACKS OF DEFENDANT'S HORSE.** Evidence that certain horse-tracks led from the place where the arson was committed to defendant's barn, and that the tracks corresponded in size to the feet of defendant's horse, *held* insufficient to sustain a verdict of guilty, without other evidence connecting defendant with the crime; and the other evidence offered against defendant in this case (see opinion) was as consistent with his innocence as with his guilt.
2. ———: ———: ———. In such case defendant should have been allowed to show that his horse could not wear a shoe of the size of the track in question.
3. ———: **CROSS-EXAMINATION: PRACTICE.** Where a witness testifies in chief to a conversation, his cross-examination should be confined to the same subject.

Appeal from Buchanan District Court.

TUESDAY, APRIL 7.

THE defendant was indicted for the crime of setting fire to and burning fifteen stacks of hay, the property of one Small. The cause was tried, and the defendant found guilty, and he appeals.

H. W. Holman and *H. Boies*, for appellant.

Smith McPherson, Attorney-general, for the State.

ROTHROCK, J.—The hay was burned in the night-time. The fire was discovered while the stacks were burning, and Small, the owner of the hay, and others, collected at the fire, and were on the ground at daylight next morning. They

discovered certain horse-tracks leading up near where the hay had been stacked, and then away from the place. The defendant and Small owned and resided on adjoining farms. Small, and some three or four others, followed these horse tracks up near to the defendant's barn. They measured the tracks with a stick, and went to defendant's barn, and, with defendant's consent, they measured the feet of a horse belonging to defendant, and which was in the barn. Small claimed that the tracks found leading to and away from his stack-yard were made by the defendant's said horse. He made this claim in the presence of the defendant. This alleged similarity between the tracks and the shoes on the horse was the principal fact relied upon to convict the defendant of the crime. It is true, there had been some ill feeling between the parties previous to that. The defendant claimed that he had an account against Small, which he assigned to another person, who commenced suit upon it. Small set up a counter-claim, and recovered judgment for costs. A witness testified that some two or three weeks before the fire the defendant, in speaking of the lawsuit, said: "This is not the end of it."

We have carefully examined the testimony relating to what occurred on the day after the fire. There were two or three interviews between Small and his friends on one side, and the defendant on the other side. After the first measurement of the shoes on the horse, Small and his friends desired to measure the shoes again, and defendant objected, but afterwards consented that it might be done. A day or two after the fire, the defendant took the horse to a blacksmith and had the shoes removed, and nailed together and marked by the blacksmith, so that he could identify them. The question as to whether the tracks were made by the defendant's horse was disputed clear through the trial. But, suppose it be conceded that they were made by said horse, what does it establish? We think a jury would be warranted in finding therefrom that the stacks were fired by some one

who rode the horse to the stacks. And, if there were any other evidence in the case pointing to the defendant as the guilty party, the fact that his horse was at the place where the fire occurred would be a strong circumstance against him. But, without such evidence, the tracks amount to no more than mere suspicion. The defendant's barn stood open, and, unless there is other evidence connecting the defendant with the crime, how can it be said that the defendant was the criminal?

We have searched the record in vain for any other evidence against the defendant. Every act done and declaration made by him after the fire is as consistent with innocence as it is with guilt. His refusal to have the mare's shoes measured the second time was just as fairly attributable to the indignation of an innocent man at being accused of a high crime as it was to a desire to conceal the evidence of a crime he had committed. We are satisfied that there was not sufficient evidence to warrant a verdict of guilty.

II. In view of a new trial, we deem it proper to say that the defendant should have been permitted to show that the horse in question could not wear a shoe of the dimensions given as the size of the track measured by Lewis Small. The declaration of the defendant, made after the fire, that he would "make Small wish he had left him alone before he left him," ought not to have been introduced in evidence. Whatever of hostility to Small was evinced thereby might quite as well be attributed to the accusation made against defendant for burning the hay as to any previous malice or ill-will, and the cross-examination of the witness Blank should have been confined to the subject of conversation to which he testified in his examination in chief.

REVERSED.

THE STATE V. GRAHAM.

1. **Larceny: OF MONEY FROM PERSON: SUFFICIENCY OF INDICTMENT.**

The indictment in this case, charging that the defendants, "on the 16th day of April, 1882, in the county aforesaid, seven \$100 notes, of the value and denomination of \$100 each, consisting of national bank-notes, and national currency called greenbacks, and all of the aggregate value of \$700, then and there being the property of the said A. H. H., feloniously did steal, take and carry away, contrary to law," *held* sufficient.

2. ———: ———: **EVIDENCE TO EXPLAIN POSSESSION OF MONEY.** Where bills of the denomination of the money stolen were found in the possession of one of the defendants, it was not competent, in explanation of such possession, to show that such defendant had bills of such denomination two or three months before, unless the money then had was shown to be identical with the money had after the larceny.

Appeal from Tama District Court.

TUESDAY, APRIL 7.

THE defendant was convicted in the court below of stealing certain money from the person of another, and he appeals.

W. O. Childs, for appellant.

Smith McPherson, Attorney-general, for the State.

ROTHROCK, J.—I. The defendant, with others, was convicted in the Marshall district court on this indictment. An appeal was taken to this court, and the judgment was reversed, and the cause was remanded for a new trial. See 62 Iowa, 108. After the cause was remanded, it was transferred to the Tama district court, where the trial was had from which the present appeal was taken. After the cause was transferred to Tama county, the defendant, by leave of the court, withdrew his plea of not guilty, and demurred to the indictment.

The charging part of the indictment is as follows: "The said Alex. Graham, Sophia Graham, John Daws and Hattie

1. LARCENY: Dillon, on the 16th day of April, 1882, in the
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indictment. county aforesaid, seven \$100 notes, of the value and denomination of \$100 each, consisting of national bank-notes, and national currency notes called green-backs, and all of the aggregate value of \$700, then and there being the property of A. H. Hildebrand, and then on the person of the said A. H. Hildebrand, feloniously did steal, take and carry away, contrary to law."

The demurrer was upon fifteen distinct grounds, which we do not deem it necessary to set out in this opinion. We have set out the indictment as the very best argument that could be made in support of the decision of the court in overruling the demurrer. If we were to hold that this indictment is demurrable, we should very greatly astonish the legal profession. The only respect in which it could well be made more specific is, that it might have stated how many of the \$100 notes were national bank-notes, and how many were national currency notes. But this was wholly unnecessary, because, if there was one of each, or of either, of the value of \$100, the indictment was sufficient. We must be excused from following counsel in his argument upon the sufficiency of this indictment.

II. The crime charged was committed in the city of Marshalltown. After Hildebrand lost his money, a number of \$100 notes were found in possession of one of the defendants. At the time these notes were found upon the person of one of the defendants, the defendant, Alexander Graham, claimed that none of them were stolen, and that he could prove where they were obtained,—that "they had got it at two or three different points, part of it from the bank at Iowa City." The defendant offered to prove that his wife (the party in whose possession the money was found) had from ten to twelve \$100 bills at Iowa City two or three months before the alleged larceny. This evidence was objected to, and the court asked defendant's counsel if he proposed to prove that the money

The State v. Wheeler.

possessed by the Grahams at Iowa City was the money in question; and counsel replied that he could "not show that the money is the same money that was found on them in Marshalltown." The objection to the introduction of the evidence was sustained. The defendant's counsel insists that this ruling of the court was erroneous. We think it was strictly correct. There would be very few convictions for the larceny of money, if it should be held that proof of the possession, by the party charged, of money of the same denomination, some two or three months before the crime was committed, and evidence of like character, should be held by courts to be material and proper. We discover no error in the record.

AFFIRMED.

THE STATE V. WHEELER.

85	619
85	713
85	619
100	454

1. **Appeal to Supreme Court:** NO JUDGMENT BELOW: NO JURISDICTION. Where the abstract fails to show that a judgment was rendered below, from which an appeal was taken, this court has no jurisdiction, and the appeal must be dismissed.

Appeal from Union District Court.

TUESDAY, APRIL 7.

THE indictment charges that the defendant obtained money by false pretenses. There was a verdict of guilty, and a motion in arrest of judgment and for a new trial, which was overruled. The defendant appeals.

N. W. Rowell, for appellant.

Smith McPherson, Attorney-general, for the State.

SEEVERS, J.—The abstract fails to state that any judgment was rendered. No appeal can be taken in a criminal case until after judgment. Code, § 4522. For aught we know,

 Foster v. Trenary.

no judgment has been rendered in the district court. Error must affirmatively appear. If no judgment has been rendered, this court has no jurisdiction. We cannot say that there was a judgment rendered by the district court, in the absence of any evidence so showing. The appeal must be dismissed. We deem it proper to say that, on the merits, a majority of the court think there is no error in the record.

DISMISSED.

 FOSTER V. TRENARY.

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| 86 | 111 |
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| 94 | 498 |
| 65 | 620 |
| 109 | 299 |
| 65 | 620 |
| 110 | 527 |
1. **Assignment: OF DEED OF PATENT-RIGHT: PAROL TO SHOW INTENTION OF PARTIES.** Where the grantee in a patent-right deed, by a written indorsement thereon, transferred all his rights thereunder to plaintiff, it was competent to show by parol, in a suit of the plaintiff against the grantor, that it was the intention to convey by the assignment not only the right to the patent, but also the right to recover against the grantor for fraudulent representations made in the sale of the right to the grantee. Compare *Moore v. Lowrey*, 25 Iowa, 336, and *Conyngham v. Smith*, 16 Id., 474.
 2. **Fraudulent Representations: SALE OF PATENT-RIGHT: EVIDENCE OF FRAUDULENT DEVICES IN OTHER SALES.** In an action based upon false representations in the sale of a right to a patented device for which certain advantages were claimed, *held* that, if defendant had been compelled, in dealing with others, to resort to fraudulent means for the purpose of making an apparently successful exhibition of the device, evidence thereof was admissible as tending strongly to show that he knew that he was making a fraudulent claim for it when he sold to plaintiff.
 3. ———: ———: **EVIDENCE: STATEMENTS MADE IN INTEREST OF VENDOR IN HIS PRESENCE.** In such case, where a third party accompanied the vendor, and made certain statements in the presence of the vendor, to the vendee, in relation to the utility of the patent device, *held* that such statements were binding upon the vendor, and were properly admitted in evidence.

Appeal from Plymouth District Court.

WEDNESDAY, APRIL 8.

PLAINTIFF brought this action to recover damages on

account of certain fraudulent representations alleged to have been made by defendant in the sale of certain interests in a patent-right. There are three counts in the petition. The first count alleges a cause of action growing out of a transaction between plaintiff and defendant; the second count alleges a cause of action growing out of a transaction between defendant and one O. C. Foster; and the third count alleges a cause of action growing out of a transaction between defendant and O. C. Foster and W. E. Nippert; and it is alleged in the second and third counts that plaintiff is the owner of the causes of action therein set forth. Defendant in his answer admitted the sale of an interest in said patent-right to the parties named in the petition, but all the other allegations are denied. The district court rendered judgment for plaintiff on each count of the petition, and defendant appeals.

Struble, Rishel & Sartori, for appellant.

Argo, Kelley & Augir, for appellee.

REED, J.—I. The patent-right in question covers an attachment by which it is claimed that an ordinary stirring plow may be connected with a sulky cultivator in such a manner as that the combination may be used as a sulky plow. Defendant was the owner of the patent, and he sold to plaintiff the right to manufacture, use and vend said attachment in Cherokee county, and gave him a deed of the territory. He also sold and conveyed to the parties named in the second and third counts of the petition the same rights as to other counties.

The alleged frauds consist in certain statements and representations as to the practicability, utility and value of the device, which it is charged were made by defendant pending the negotiations which resulted in the sales. The trial below was to the court, and there was a finding of the facts. The court found that the alleged representations were made by defendant, and that they were false and fraudulent. It also

1. ASSIGN-
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found that plaintiff was the owner of the claims for damages which accrued, under the transactions set out in the second and third counts of the petition, to the parties therein named. For the purpose of proving his ownership of said claims, plaintiff offered in evidence certain assignments, which were indorsed on the deeds given by defendant to the parties named in the second and third counts, of the territory sold to them.

The assignment which was indorsed on the deed to O. C. Foster is in the following words: "We hereby sell, assign, transfer and set over all our right, title and interest in and to the within deed, and to all rights of ours thereunder, to Charles F. Foster. October 3, 1882. O. C. FOSTER." The other assignment is in substantially the same words. Defendant objected to the introduction of these assignments in evidence, on the ground that they did not purport to be assignments of the damages resulting to the parties by reason of the alleged frauds, but were assignments merely of the rights and interests acquired by the parties under the deeds. This objection was overruled, and this ruling is assigned as error. The right which the grantees named in the deeds acquired thereunder was the right to manufacture, use and vend the patented device in the territory named therein; and the rights and interests which, by the express terms of the assignments, are transferred to plaintiff are those which accrued to the assignors under the deeds. There was parol evidence, however, which tended to prove that the real intention of the parties was to transfer to plaintiff their claims for damages on account of the alleged frauds of defendant in the sales of the patent-right to them, and that the understanding between them and plaintiff was that the effect of the assignments was to transfer said claims to him. On this showing as to the intention and understanding of the parties to the instruments, we are of opinion that the court properly admitted them in evidence.

It was held by this court in *Moore v. Lowrey*, 25 Iowa,

336, that no particular form is necessary to constitute an assignment of a debt, and that such assignment may be verbal or in writing, and if in writing, and the intent and contract of the parties is not fully expressed therein, it may be shown by evidence *aliunde*. And to the same effect is *Conyng-ham v. Smith*, 16 Iowa, 474. Under the rule as laid down in these cases, the parol evidence as to the intention of the parties to the assignments was competent, and the finding of the court, that plaintiff was the owner of the claims set out in the second and third counts of the petition, is abundantly sustained.

II. At the time of the negotiation between the parties, defendant had in his possession a plow which was rigged with the patented device, which he exhibited to plaintiff and the other parties, and with which he did some plowing in their presence. This plow, at the time of these exhibitions, worked in a satisfactory manner. But the evidence tends to show that, when plaintiff and the other parties rigged other plows with the attachment, they were unable to do any work with them. One of the difficulties which they encountered in their attempts to make them work was, that the plows could not be kept in the ground; another was that the neck-yoke was thrown up by the weight of the plow in such a manner as to interfere with the team. And it was claimed by plaintiff that defendant obviated this latter difficulty by using a heavy iron neck-yoke with the plow which he exhibited at the time of the negotiation, and that he avoided the other trouble by attaching the plow to a cultivator which had been so altered as to specially adapt it to that particular use; and that these facts were concealed by defendant during the negotiation.

Plaintiff offered evidence tending to prove that, at some time before the negotiation, defendant had procured an iron neck-yoke, and that he used said yoke at other exhibitions of the plow, and that he caused certain alterations to be made

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in the cultivator to which he attached the plow exhibited by him. Defendant objected to all this evidence, on the ground that, as it did not relate to the transactions in question, it was incompetent and immaterial. This objection was overruled. We think the ruling was correct. The special advantage which defendant, in the negotiation with plaintiff and the other parties, claimed for the patented device was, that by means of it an ordinary plow could be attached to any of the sulky cultivators in common use, and by this combination an implement was made which possessed all the advantages of a sulky plow. Now, if he had been compelled to resort to the means alleged for the purpose of making an apparently successful exhibition of the device, this would tend strongly to show that he knew that he was making a false claim for it.

III. Evidence was admitted, against defendant's objection, of certain statements by one Hayward as to the utility 3. —: —: and value of the device. These statements were evidence: statements made in interest of vendor in his presence. made to Nippert during the negotiation for the sale to him. The objection urged by defendant to this evidence is that it was not proven that Hayward was authorized to bind defendant by any statement he might make. But it was shown that Hayward accompanied defendant to the place where the negotiations with Nippert took place, and that defendant went there for the purpose of attempting to make a sale to Nippert, and that Hayward made the statements in his presence. Under these circumstances, the evidence of the statements was clearly admissible.

We find no error in the record, and the judgment will be

AFFIRMED.

VAN DUZER V. VAN DUZER.

1. **DIVORCE: PETITION FOR MUST BE VERIFIED: TEMPORARY ALIMONY ON PETITION NOT VERIFIED.** Section 2222 of the Code, requiring petitions for divorce to be verified, must be regarded as mandatory, so that no divorce can legally be granted upon an unverified petition; but the court may require the verification to be made at any time before the final hearing, and in the meantime will have jurisdiction of the cause for interlocutory purposes; and so where the original petition was radically defective, but was cured by an amendment which was not verified, but which defendant had answered, *held* that the court had jurisdiction to make an order for temporary alimony.
2. —: **TEMPORARY ALIMONY: AMOUNT OF.** Under the circumstances of this case, (see opinion,) an allowance of \$25 per month to the plaintiff for her support during the pendency of the suit, and for \$300 for counsel fees, and \$200 for payment of witness fees, *held* not excessive; but an application to this court to increase the allowance for counsel fees in view of the appeal, is denied, on the ground that the original allowance was made, and is sufficient, for all services.

Appeal from Adair Circuit Court.

WEDNESDAY, APRIL 8.

ACTION FOR DIVORCE. The appeal is by defendant from an order of the circuit court requiring him to pay to the clerk certain sums of money for the separate support and maintenance of plaintiff during the pendency of the suit, and to enable her to prosecute the action.

Wolf & Landt and *Fogg & Neal*, for appellant.

W. D. Kelsey and *E. Willard*, for appellee.

REED, J. The order appealed from requires defendant to pay to the clerk the sum of \$25 on the fifteenth day of each month, during the pendency of the suit, for the support and maintenance of plaintiff; also the sum of \$300 for the fees of her counsel, and \$200 for the payment of witness fees, and such other costs and expenses as might be incurred in preparing the case for trial.

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It was shown, on the hearing of the application for the order, that plaintiff had no means of her own adequate for her support, or for the payment of the costs and expenses of the suit. The first objection to this order urged by defendant is, that no legal cause for divorce is alleged in the petition. The division of the original petition in which the pleader attempted to state a cause of divorce, is as follows: "Par. 6. That on or about the ——— day of ———, 18—, the said defendant assaulted this plaintiff at the residence of the defendant, and at divers other times during their married life he, the said defendant, has abused and maltreated this plaintiff, and the abuse and ill-treatment received by this plaintiff is such that she fears to live with him longer as his wife." That this paragraph fails to state a cause for divorce is very apparent. But, before the order in question was made, plaintiff filed an amendment to her petition in which a number of acts of cruel and inhuman treatment by defendant are alleged, and it is averred that the life of plaintiff has been endangered thereby. This amendment, however, was not verified. But defendant filed an answer denying the averments thereof. It is provided by section 2222 of the Code that all of the allegations of the petition in an action for divorce must be verified by the oath of the plaintiff.

Counsel for defendant contend that, as the amendment was not verified, the court should have disregarded it in determining the application for temporary alimony, and that, as the original petition did not allege a cause for divorce, the order allowing alimony should not have been made. The provision of section 2222, requiring the verification of the allegations of the petition by the oath of plaintiff, was doubtless intended to be mandatory. The language of the provision is that "the allegations of the petition *must* be verified," etc. The section was enacted, doubtless, to prevent as far as possible all looseness of practice in actions for divorce, and its requirements should be strictly enforced in all cases. We

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do not agree with plaintiff's counsel that, by answering the unverified allegations, defendant waived the provision requiring them to be verified. It was enacted, not for the benefit of defendants in actions for divorce, but as a hindrance to easy divorces,—a matter in which the state is concerned,—and it cannot be waived by the defendant. It does not relate, however, to the jurisdiction of the court. It prescribes simply a rule of practice for the government of cases of this kind, and this rule is intended to govern only as to the final judgment in the case. What is prohibited by the provision is the granting of a divorce, unless the requirement as to verification is complied with. The power of the court to make any interlocutory order proper to be made in the case is not at all affected by it. By answering the unverified amendment to the petition, defendant waived the right to object as to the time of verification. The court can, and doubtless will, require the provision of the statute to be complied with before the final hearing of the case. We think, then, that the averments of the amendment to the petition might properly be considered by the court in determining the application for temporary alimony. The simple fact of the pendency of the action for divorce is sufficient to entitle the wife, who has no adequate means of her own, to alimony during its pendency. 2 Bish. Mar. & Div., §§ 384, 385.

II. The next objection urged against the order is, that the amount allowed to pay counsel fees and meet the other expenses of preparing the case for trial is excessive. The order directs that the \$300 allowed for attorneys' fees be paid to the clerk, and it provides that the amount may be paid by the clerk to plaintiff's attorneys. This allowance is made for the purpose of providing for the compensation of the attorneys for such services as they may render in the further progress of the case, as well as for those already rendered when the order was made, and we cannot say that it is excessive. An answer had been filed when the order was made, and the issue thus made is to be tried. It

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was shown that the witnesses who could give testimony tending to establish plaintiff's claim were widely scattered. All the indications are that the preparation of the case for trial, and its trial, will devolve very considerable labor upon counsel, and we think the amount awarded does not exceed a fair compensation for this labor. The \$200 allowed for the payment of witness fees, and other expenses incurred in the preparation of the case for trial, is also ordered to be paid to the clerk, and there is no direction in the order for the payment of the sum to plaintiff. It will be the duty of the clerk to apply such portion of this fund as may be necessary in payment of the costs as they accrue, and, if it should transpire that the amount is more than is required for that purpose, the excess will be returned to defendant, so that he will suffer no prejudice from the order, even if the amount shall prove to be excessive.

III. An attachment was issued when the suit was instituted, and it was levied on a large amount of property belonging to defendant. He contends that the order should not have been made, for the reason that, by the seizure of his property on the attachment, he would be prevented from complying with its requirements. The order, however, releases all personal property seized on the writ. The evidence shows that the value of this property is greatly in excess of the amount which defendant is required by the order to pay. The attachment, we are satisfied, does not deprive him of the ability to perform the order. We see no reason for disturbing the order on any of the grounds urged.

IV. Plaintiff filed in this court an application for an additional allowance for the payment of the charges of her counsel for their services on this appeal. This application is overruled. The amount allowed by the order of the circuit court for attorneys' fees, as stated above, is for the compensation of counsel for all services in the case, and it does not appear to us to be inadequate for that purpose.

AFFIRMED.

RENO V. MCCULLY ET AL.

1. **Guardians: BONDS OF: MUST BE APPROVED BY THE COURT AND NOT BY THE CLERK: LIABILITY OF CLERK FOR RECEIVING INSUFFICIENT BOND.** Although the clerk of the circuit court has power to appoint a guardian in vacation, (Code, § 2315,) he has no power to approve the bond of such guardian. That duty devolves upon the court, (Code, § 2246,) and should be attended to at the next term after the appointment is made by the clerk. Hence, a clerk is not liable in damages upon his bond for failing to demand a sufficient bond of a guardian, or for taking and recording a bond filed by the guardian without a surety.
2. ———: ———: **DUTY OF CLERK: THE TERM "PROBATE."** The duties imposed on the clerk of the circuit court by section 2621 of the Code are limited to "bonds relating to *probate* matters," but the term "probate," when strictly used, relates to the proof of wills, but, in a more extended sense, it relates to the proceedings incident to the administration and settlement of the estates of decedents, and it is so used in the section referred to. But the business pertaining to a guardianship is in no proper sense probate business.

Appeal from Jasper Circuit Court.

WEDNESDAY, APRIL 10.

ACTION on an official bond. Defendant McCully was clerk of the circuit court, and the other defendants are the sureties on his official bond. During his term of office, said McCully appointed one S. N. Lindley guardian of the property of plaintiff, who at that time was a minor, and it is alleged in the petition that said guardian received certain money which belonged to plaintiff, which he has never accounted for, although plaintiff has attained his majority, and that he is now insolvent. It is also alleged that said McCully failed to require said guardian, at the time of his appointment, to give a bond with sufficient sureties, as required by law, but accepted a bond signed only by the guardian, and that, by the acceptance of said bond by defendant, the guardian was empowered to act as such, and that he did, in pursuance of his appointment and the acceptance of his bond, enter upon the discharge of his duties as guardian, and received said money

while acting as such guardian. Defendants answered, denying the allegations of the petition. There was a trial to the court, and judgment was rendered for plaintiff, and defendants appeal.

Ryan Bros., for appellants.

Stahl, Meredith & Stahl, for appellee.

REED, J.—The evidence given on the trial shows that the appointment of the guardian was made by the clerk in vacation. At the time of his appointment, the guardian filed a bond conditioned that he would account for and pay over all moneys or other property belonging to the ward which should come into his hands as such guardian. There was no surety on this bond. It was signed by the guardian alone. The oath of the guardian was indorsed on the bond, and this oath was taken before the clerk. The bond was recorded by the clerk in the book kept for that purpose, but there is no other evidence of the acceptance or approval by him of said bond. It was also proved that the guardian received certain moneys belonging to plaintiff, and that he has never accounted to plaintiff for said money, and that he is now insolvent, and that plaintiff has attained his majority.

Plaintiff's position is that it was the duty of the clerk to require the guardian to give a bond at the time of his appointment, with sufficient sureties, conditioned for the faithful performance of his duties as such guardian, and that the appointment of the guardian without requiring such bond was a violation of his official duties, for which the clerk and his sureties are liable on his bond. It is claimed that the duty of the clerk in this respect is prescribed by section 2321 of the Code. This section is as follows: "All bonds relating to probate matters shall be filed in the office of the clerk of the circuit court, and shall not be deemed sufficient until examined by the clerk, and his approval indorsed thereon."

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clerk: liability
of clerk for
receiving in-
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The section occurs in title 16. This title relates principally to matters pertaining to the administration and settlement of the estates of decedents. The rules governing the execution of wills and the admission of the same to probate are prescribed in the title. The appointment of executors and administrators is also provided for, and their powers and duties are defined. The manner of collecting the assets of estates, the establishment of claims against them, and their payment, and the payment of legacies out of the assets, and the descent and distribution of intestate property, are all matters which are governed by the provisions of the statutes contained in this title.

There are also two general provisions in the title with reference to the guardianship of minors and others requiring guardianship. The first is found in section 2312, which provides "that the circuit court of each county shall have original and exclusive jurisdiction * * * of the persons and estates of minors and others requiring guardianship." The second is in section 2315, which provides that the clerk shall have power to appoint guardians, administrators, etc., in vacation. The general provisions of the statute with reference to the matter of guardianship, however, are found in chapter 5 of title 15. The appointment of guardians is provided for in this chapter, and their powers and duties, with reference to the persons and property of their wards are there prescribed. And it is provided in section 2246 that "guardians appointed to take charge of the property of a minor must give bond, with surety, to be approved by the court, in a penalty * * * conditioned for the faithful discharge of their duties as such guardians according to law." It is our opinion that section 2321 has no reference to the bonds of guardians, and that it imposes no duty upon the clerk with reference to the approval of such bonds, but that the duty of passing upon the sufficiency of the bond of a guardian is prescribed by section 2246, and that this duty devolves upon the court, and cannot be performed by the clerk in

vacation. This conclusion is supported by two satisfactory reasons: (1) Section 2246 occurs in the chapter in which the powers and duties of guardians are prescribed and defined. It provides that a bond shall be given, and that the surety thereon must be approved by the court. Having made this provision for the approval of the bond by the court, it is not to be presumed that the legislature intended by the subsequent section that it should be re-examined by the clerk, and his approval indorsed thereon. (2) The duty imposed on the clerk by section 2321, by the terms of the section, relates to "bonds relating to probate matters."

The term "probate," when strictly used, relates to the proof of a will before an officer or tribunal having jurisdiction to determine the question of its validity. In common usage, however, it is often used with reference to the proceedings incident to the administration and settlement of the estates of decedents, and it is sometimes used in this sense in the statutes, and we have no doubt but the phrase "bonds relating to probate matters," in this section, relates to any and all bonds which executors or administrators may be required to give in the course of their duties. But the term is not used with reference to guardianship, or the legal proceedings incident thereto, either in the law or in common usage. A guardian's bond is in no sense a bond relating to probate matters. The section, then, relates to bonds given by executors and administrators, and it is clear that it imposes no duty on the clerk with reference to the bonds of guardians. The clerk, then, had the power to appoint the guardian in vacation, but he had no duty to perform with reference to the approval of his bond. That duty devolved upon the circuit court, and it should have been performed at the term following the appointment. The matter complained of does not, therefore, constitute a breach of the clerk's bond. The circuit court held that it did. The judgment is therefore erroneous, and must be

REVERSED.

THE TRUSTEES OF GRISWOLD COLLEGE v. THE CITY OF
DAVENPORT.

PARKER v. THE SAME.

1. **Constitutional Law: TAXATION: DUE PROCESS OF LAW: RIGHT TO NOTICE AND HEARING: RULE APPLIED.** Property taken for the non-payment of taxes is not taken without due process of law, if the taxpayer is afforded an opportunity to be heard in relation to the tax, though it be only before the officers clothed with the power to assess, and not before the courts. Whether or not the property-owner is entitled to notice and a right to be heard in all cases is not decided, (but see *Gatch v. City of Des Moines*, 63 Iowa, 718,) but *held* that a statute or ordinance which provides for an assessment *according to benefits*, so that, in making the assessment, an opinion is to be formed and discretion exercised by the assessors, but which fails to provide for notice to property-owners, and an opportunity for them to be heard, is unconstitutional, and that the collection of a tax assessed and levied under such statute or ordinance should be enjoined. Compare *Auer v. City of Dubuque*, *post*.

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86	291
65	633
103	576
65	633
111	157
65	633
117	655
65	633
118	35
65	633
121	491
122	96
65	633
132	591
65	633
137	113

Appeal from Scott District Court.

WEDNESDAY, APRIL 8.

ON REHEARING.

THESE actions were brought to enjoin the collection of a sewer tax levied without notice upon adjacent property as a special assessment. There was a decree for the plaintiffs, and the city appeals.

Bills & Block, for appellant.*Putnam & Rogers*, for appellees.

ADAMS, J.—In an opinion filed at the January term, 1884,* the court held that these cases should be affirmed; following *Gatch v. City of Des Moines*, 63 Iowa, 718. The cases, however, differed in some respects from that, and, because they differed, and also because some of the members

* This opinion, containing no argument, and stating no principles, but only referring to *Gatch v. City of Des Moines* for the grounds of the decision, is not published.

of the court came to entertain a doubt in regard to the correctness of the ruling in *Gatch v. City of Des Moines*, it was deemed advisable to grant a rehearing. Upon a re-examination, we have to say that we reach the same result, but the ground upon which we reach it is such that it is unnecessary either to overrule or approve *Gatch v. Des Moines*. In that case it was held in general to be essential to the validity of an assessment for public improvements that the property owner should have notice of the intended assessment, and an opportunity to be heard in respect to it, and that a statute allowing such assessments, without notice and without opportunity to be heard, is unconstitutional. The theory of the opinion is that, where property is taken for the non-payment of a special tax levied without notice, and without opportunity in any form to be heard upon it, the property is taken without due process of law. For the purposes of the opinion in the cases before us, it is not necessary to state the rule so broadly.

The parties are agreed that property cannot be taken without due process of law, but they differ upon the question as to what constitutes *due process of law* in respect to the levy and collection of taxes. It is not contended, of course, by any one that property cannot be taken for the non-payment of a tax without giving the property owner an opportunity to be heard in court. In some cases, where the right to life, liberty or property is drawn in question, such opportunity is necessary, and if life, liberty or property were taken otherwise, it would not be taken by *due process of law*. But the courts are not necessary for taxation. Their methods are too cumbersome and expensive. It seems to be agreed, therefore, that property taken for the non-payment of taxes is not taken without due process of law, if the tax-payer is afforded an opportunity to be heard in relation to the tax, though it be only before the officers clothed with power to assess. The rule in respect to due process of law, stated in a general way, is said to be this: that every one is entitled to the protection

of "those fundamental principles of liberty and justice which lie at the basis of all our civil and political institutions." But the plaintiffs, having been afforded no opportunity to be heard, contend that they would be deprived of the guaranteed protection if the assessment in question should be upheld, and their property should be taken under it. While not, admitting that property can properly be taken under a special assessment in any case, without notice to the property owner of the intended assessment, they contend that it clearly cannot in some cases, and especially where the assessment is made under a law or ordinance which provides for an assessment *according to benefits*, or where substantially the same principle is involved.

In a case where, in making the assessment, no opinion is to be formed nor discretion exercised, it is manifest that there would be less ground for contending that a notice is necessary. In such case a hearing is less important to the property owner. But the plaintiffs contend that in the cases before us there is not only a question of benefits, but of comparative benefits. Their position in this respect is based upon the provision of the ordinance under which the sewer was constructed and the assessment made. The provision is expressed in these words: "Provided, that the council shall have the power to order that a part of the cost of the construction of any particular sewer shall be paid out of the general revenue of the city." We think that under this provision (assuming that the provision did not have the effect to nullify the ordinance, about which there may be some doubt) the council was charged with the duty of determining whether any part of the cost of constructing the sewer should be paid out of the general revenue, and if so, what part. Upon what basis such determination should be made the ordinance does not show, but no one would contend that it should be done arbitrarily. It follows, then, that it should be done in the exercise of judgment and discretion.

The only justification for any special assessment is the

special benefit supposed to be received from the improvement. But the special benefit differs in different cases, and so also does the benefit enjoyed by the public. There may be other considerations which should influence a city council in determining what part of the cost of a sewer, if any, should be paid out of the general revenue, but the one suggested could not, we think, properly be overlooked; nor is it easy to conceive of any consideration, whatever others there might be, which would not address itself to the judgment and discretion of the council. The principle involved, then, it appears to us, differs in no essential respect from that found in many cases where the cost of an improvement is to be apportioned among the property owners according to benefits. The cases before us, then, fall, we think, within the rule of those cases, and we have to say that we think that they hold that a right to a notice and an opportunity to be heard is a constitutional right, where such apportionment is to be made. Among the cases so holding are the following: *Boorman v. City of Santa Barbara*, 65 Cal., 313; *Hagar v. Reclamation Dist.*, 111 U. S., 701; *State v. Newark*, 25 N. J. Law, (Dutch,) 399; *Campbell v. Dwiggins*, 83 Ind., 473.

Under the view which we now take, our decision does not depend wholly upon *Gatch v. City of Des Moines*. It is not necessary, therefore, to notice the special matters wherein the appellant claims that the present case differs from that. We adhere to our conclusion formerly reached, and the judgment must be

AFFIRMED.

SMITH V. QUIGGANS.

1. **Homestead: EXEMPTION: FIRST FLOOR OF DWELLING USED AS GROCERY: ABANDONMENT: INTENTION TO REOCCUPY.** Where the head of a family for a while occupied both floors of a building as his dwelling, but afterwards used the lower or first floor for the purposes of a grocery store carried on by himself, while the family occupied the second floor as their dwelling, *held* that the first floor, being worth less than \$300, was all the time exempt as a part of the homestead, within the meaning and spirit of § 1997 of the Code; and the fact that, after he went out of the grocery business, he did not for a while actually use the first floor for any purpose, though it was his intention to again occupy it with his family, did not make it liable for his debts. *Rhodes v. McCormack*, 4 Iowa, 368, and *Mayfield v. Maasden*, 59 Id., 517, distinguished.

95 637
123 564*Appeal from Guthrie Circuit Court.*

WEDNESDAY, APRIL 8.

PLAINTIFF instituted a suit on an account for goods sold and delivered to defendant. An attachment was issued in the case, which was levied on certain real estate. Defendant filed a cross-petition, in which he alleged that said property was his homestead, and was exempt from judicial sale for the satisfaction of the debt sued on, and he prayed that it be released from said levy. Plaintiff had judgment for the amount of his claim, but, upon the trial of the issue joined on the allegation of the cross-petition, it was adjudged that the property was defendant's homestead, and that it was exempt from sale for the satisfaction of plaintiff's claim, and it was released from the levy of the attachment. Plaintiff appeals from this judgment.

Gatch & Weaver, for appellant.

Cardell & Shortley, for appellee.

REED, J.—The property in question is a two-story building, and the town lot on which it is situated. Defendant purchased the ground and erected the building, and occupied it

with his family as a residence, before the debt to plaintiff was contracted. They lived in the lower story for some time, but afterwards moved into the second story and used that as a place of residence. The first story was divided into two rooms, and, after the family moved into the second story, they continued to use the rear room of the first story as a kitchen. Defendant went into business as a grocer, and used the front room as a store-room. Afterwards the partition between the two rooms was removed, and the whole of the first story was devoted to the use of the said business, with the exception that some of the household effects, and provisions for the use of the family, were stored in the rear part of it. Access is gained to the second story by an outside stairway. The building is 20 by 36, and cost about \$800. The evidence is that the lower story is worth about \$275. Defendant, as we infer, failed in business, and his stock of goods was taken possession of by another party, who used the store-room while selling them out; but it does not appear by what right they were taken. The store-room was not leased to the party; and defendant testified that it was his purpose in the future to use the whole building as a residence, and that the second story did not contain sufficient room for his family.

It is not claimed by plaintiff that either the second story or the ground on which the building is situated is subject to be sold for the satisfaction of the judgment, but he contends that the lower story of the building is not exempt from judicial sale. We think, however, that the whole property is exempt. Defendant occupied and used the first story of the building in the prosecution of his ordinary business. If this had been a separate building of the same value, and situated on the same premises, and he had used it for the same purpose, it clearly would be exempt, under section 1997 of the Code. The exemption law should be so construed as to effectuate the very object which the legislature had in view when the statute was enacted.

Regard ought to be had to the spirit of the law rather than

to its strict letter. The manifest purpose of the legislature was to exempt to the owner, in addition to the building or place occupied by him as a home for his family, the building or place which he uses and occupies in the prosecution of his ordinary business, provided it is appurtenant to the homestead, and its value does not exceed \$300. If the property used by the owner for that purpose is part of the same building used by him as a home, this purpose is certainly effectuated by exempting it from sale. The intention of the law is as surely accomplished by exempting it as it would be by exempting a building similar to it which was entirely detached from the home. So long, then, as defendant continued to use and occupy the property in carrying on his business, it was exempt under the provisions of section 1997. The case is clearly distinguishable from *Rhodes v. McCormack*, 4 Iowa, 368, and *Mayfield v. Maasden*, 59 Id., 517. The property involved in those cases was either not used and occupied by the owners in the prosecution of their ordinary business, or its value exceeded the amount prescribed by the statute. We think, also, that the property did not become subject to sale when defendant ceased to carry on the business in it. Before engaging in the business he used and occupied it as a home for his family, and during the time he carried on the business he also devoted it to some extent, in connection with the second story to the same use. And it was his purpose at all times to reoccupy and use it as part of his home whenever he should cease to use it in carrying on the business.

We think, therefore, that the judgment of the circuit court is correct, and it is

AFFIRMED.

RARIDON V. THE CENTRAL IOWA RAILWAY COMPANY.

1. **Railroads: FAILURE TO CONSTRUCT CATTLE-GUARDS: DAMAGES: SUFFICIENCY OF PETITION.** Plaintiff's petition in this case considered, (see opinion,) and found to show upon its face that he had sustained some damages by reason of defendant's neglect of its legal duty to construct cattle-guards where its road entered and left plaintiff's farm, and held that the amount of such damages was a proper question for the jury upon the evidence, and that a demurrer to the petition was erroneously sustained.

Appeal from Jasper Circuit Court.

WEDNESDAY, APRIL 8.

THIS is an action at law, by which the plaintiff seeks to recover damages of the defendant for its failure to put in cattle-guards where the railroad of defendant enters and leaves the fenced and improved lands of the plaintiff. There was a demurrer to the petition, which was sustained, and the plaintiff appeals.

A. R. Campbell and *Alanson Clark*, for appellant.

J. H. Blair and *A. C. Daly*, for appellee.

ROTHROCK, J.—The petition and the amendment thereto set forth, in substance, that the defendant's railroad was lawfully constructed over and across plaintiff's farm, and that by the construction of the road the plaintiff's inclosed and fenced fields were thrown open, and that defendant neglected and refused for the period of about one year to place cattle-guards at the proper places, and that by reason of said failure and neglect the plaintiff's fields were thrown open to the public; that plaintiff had on his farm 103 acres of heavy grass, of the value of \$2.50 per acre, and 30 acres of corn-stalks, of the value of \$1 per acre, for the winter of 1882-83, and the value of the same was destroyed; that he owned 100 cattle,

for which he had saved said grass and stalks, and that he could not turn his herd into said pasture because of said openings in the fences, and that he could not protect himself from the loss of the pasture by any reasonable means. He claimed damages in the sum of \$300.

The demurrer was to the effect that the petition failed to show that the neglect to put in cattle-guards resulted in depriving the plaintiff of the use of his winter pasture, and failed to state any fact showing how such failure to put in cattle-guards resulted in any legal damage to the plaintiff; and that the facts pleaded show that the plaintiff's loss of his pasture resulted from his groundless fears and voluntary omission to feed and use the same; and that the damages sought to be recovered are remote, speculative and consequential.

The statute requires that every railroad company shall make proper cattle-guards where its railway enters or leaves any improved or fenced land, and shall be liable for all damages sustained by reason of such neglect and refusal. Code, § 1288. And the owner of the land has no legal right to construct cattle-guards across the track, and is not bound to do so to protect himself from damages by reason of the want thereof. *Downing v. Chicago, R. I. & P. R'y Co.*, 43 Iowa, 96. Under the averments of the petition, the plaintiff was entitled to recover whatever damages, if any, he fairly sustained by reason of his land having been thrown open and left unfenced; and he cannot recover damages which he might have prevented by reasonable care.

In *Smith v. Chicago, C. & D. R'y Co.*, 38 Iowa, 518, where the plaintiff, after the construction of the railroad, planted crops, which were destroyed by cattle by reason of the neglect to construct cattle-guards, it was held that the measure of damages was the market value of the crops when matured, less the expense of fitting them for market from the time of the injury, less whatever the value of the portion saved, if any, may be.

In *Donald v. St. Louis, K. C. & N. Ry Co.*, 44 Iowa, 157, where a crop of corn was damaged by cattle to the extent of 150 bushels, by reason of the neglect to build cattle-guards, it was held that the measure of damages was the value of the corn destroyed. In that case it was claimed that the plaintiff should have allowed the premises to remain uncultivated, and that the proper measures of the damages is the rental value of the land; but this court ruled otherwise, upon the ground that it was defendant's duty to erect cattle-guards, and plaintiff had a right to suppose this duty would be performed.

In the case at bar the plaintiff claims damages for the total loss of his grass and corn-stalks, and alleges that they were entirely worthless by reason of the failure and neglect of the defendant to put in the cattle-guards. It is easy to see that they were of less value than they would have been if the land had been inclosed. How much less value they would have been is a question to be determined upon the proof on the trial. The fact that a claim is made for more damages than a party is entitled to, is no ground for demurrer. The question as to whether he should have used the pasture and stalks so far as he could do so, and what interference with the use, or how much was destroyed by other stock pasturing on the same, and all such considerations, are mere matters of evidence.

We think the demurrer should have been overruled.

REVERSED.

Burt v. Harrah, Adm'r.

BURT V. HARRAH, ADM'R.

1. **Constitutional Law: REFERENCE OF CAUSE INVOLVING MUTUAL ACCOUNTS: CLAIM AGAINST ESTATE: RIGHT OF TRIAL BY JURY: EQUITABLE JURISDICTION.** When there is great perplexity in the accounts between the parties to an action for the establishment of a claim against an estate, and an examination of the accounts by a jury is impracticable, the cause is a proper one for equitable cognizance, and, under § 2816 of the Code, the court may, on its own motion, refer such a case to a referee to report the testimony, the facts found, and the conclusions of law; and, as § 9 of article 1 of the constitution does not guarantee a right of trial by jury in causes of equitable cognizance, that guaranty is not violated by such reference.

65	643
88	7
65	643
6114	616
65	643
124	677

Appeal from Jasper Circuit Court.

WEDNESDAY, APRIL 8.

THE plaintiff filed a claim against the estate of Titus B. Eldridge, by which he demanded a balance due to him in the sum of \$15,728. An answer was filed by the administrator, pleading the statute of limitations as to part of the claim, and a counter-claim in the sum of \$2,000, for professional services rendered by decedent as an attorney and counsellor at law, in an action in which plaintiff was a party, and at his request, and for \$1,000 for costs advanced and paid in said action at the request of defendant. He also set up a claim for the value of certain cattle and hogs which belonged to the estate of decedent, and which were sold and the proceeds appropriated by the plaintiff, and also a claim for certain other personal property belonging to said estate, which plaintiff appropriated and converted to his own use. The court, upon its own motion, ordered that the issues between the parties be referred to a referee to report the testimony, facts found, and conclusions of law. The defendant excepted to the order, and appeals.

Cook & Patterson and A. M. Harrah, for appellant.

H. S. Winslow, for appellee.

Burt v. Harrah, Adm'r.

ROTHROCK, J.—Section 2816 of the Code provides that, ‘when the parties do not consent, the court may, upon the motion of either, or upon its own motion, direct a reference in either of the following cases: (1) When the trial of an issue of fact shall require the examination of mutual accounts, or when, the account being on one side only, it shall be made to appear to the court that it is necessary that the party on the other side should be examined as a witness to prove the account, in which case the referee may be directed to hear and report upon the whole issue, or upon any specific question involved therein. * * *

The claim filed by plaintiff is in the form of an account. It covers a period of about eight years. The items are so numerous that it requires thirty-eight pages of the abstract to set them out. The charges appear to be for managing gas-works part of the time, and for some kind of office-work, and for carrying on and superintending a farm, and there are hundreds of items of expenditures set out, which appear to have been incurred in connection with these operations. The account is not all on one side. The charges against the estate amount to \$25,971.16, and the credits aggregate \$10,242.22, and judgment is demanded for the balance as shown by the account.

The answer, among other defenses, sets up a cross-claim for professional services, and for \$1,000 costs paid out and expended in connection therewith. The items of costs are not set out, but it is apparent that the claim therefor is in the nature of an account. It is very plain, therefore, that a determination of the case requires the examination of mutual accounts. This is apparent from the account as stated by plaintiff, and from the answer of the defendant. The case, therefore, is within the very letter of the statute.

It is said, however, that a compulsory reference of an action at law is a denial of the right of trial by jury, and that the statute is therefore unconstitutional, if held to apply to actions at law. It is provided by article 1, § 9, of our

Burt v. Harrah, Adm'r.

constitution that "the right of trial by jury shall remain inviolate." This right of trial by jury does not obtain in cases which are of equitable cognizance. The question, then, is, has a court of chancery jurisdiction of cases like this? In *McMartin v. Bingham*, 27 Iowa, 234, it is held that the statute now under consideration correctly specifies what was of equitable cognizance in matters of account. We think it is very clear that the claim filed and the answer thereto show that there are mutual demands between the parties which will require an examination, and in such cases the issue is one of which a court of chancery always has jurisdiction. 1 Story, Eq. Jur., § 459. It is true, as is said in *Fowle v. Lawrason, Ex'r*, 5 Pet., 495, that "it cannot be admitted that a court of equity may take cognizance of every action for goods, wares and merchandise sold and delivered, or for money advanced when partial payments have been made, or of every contract, express or implied, consisting of various items, on which sums of money have become due, and different payments have been made." But when there is great perplexity in the accounts between the parties, and an examination of them by a jury is impracticable, a court of chancery will exercise jurisdiction. The statement of the account in this case makes it very plain that it would be exceedingly difficult to have an intelligent trial of the issues before a jury. In *Blair Town Lot & Land Co. v. Walker*, 50 Iowa, 376,—a case very much like this,—it was said that a trial before a jury in that case "would be a mockery." In this case, the great length and complicated nature of the accounts are such that it ought not to be submitted to a jury.

AFFIRMED.

GARDNER V. TRENARY.

1. **Salvo of Patent-right: FALSE REPRESENTATIONS: DEED PROCURED BY SET ASIDE.** The law will not allow one committing a fraud to protect himself by the claim that his victim was easily deceived, and did not act in the matter with reasonable prudence; and so, in this case, where the evidence (see opinion) shows that defendant, by false representations as to the value and utility of a patent-right, and by fraudulent devices in exhibiting it, induced plaintiff, in exchange for an interest in the right, to convey to him his house and lot, *held* that the deed should be set aside.

Appeal from Plymouth District Court.

WEDNESDAY, APRIL 8.

THIS is an action in equity, by which the plaintiff seeks to set aside and annul a conveyance of a house and lot, made by the plaintiff to the defendant. The alleged consideration of the conveyance was a transfer by defendant to plaintiff of the right to vend and sell a certain patent-right in certain counties in this state, and in Ross county, in Ohio. It is alleged in the petition, in substance, that the patent-right was worthless, and that the defendant falsely and fraudulently represented it to the plaintiff to be a valuable invention, and warranted it to be a useful and efficient contrivance, and that, by reason of the said false and fraudulent representations and warranty, the plaintiff was induced to convey the house and lot to the defendant. There was a trial upon the merits, and a decree was entered for the plaintiff, and defendant appeals.

Struble, Rishel & Sartori, for appellant.

Argo, Kelly & Aguir, for appellee.

ROTHROCK, J.—I. The case is triable anew in this court. An examination of the evidence shows that it took a very wide range. The fact is well established that the defendant was proprietor of a patent-right, which consisted of a contrivance designed to be used to attach a walking plow to a sulky

cultivator, so as to make a sulky plow of the combination. During the spring, summer and fall of 1882, the defendant was engaged in the northwestern part of the state in disposing of the right to sell his patent in such territory as he could. He had a sulky cultivator with his patent attached, and he exhibited it at various places, and tested it in the presence of those to whom he proposed to sell territory. The plaintiff introduced evidence of alleged fraudulent sales made to others. This evidence was objected to in the court below, and we are asked to disregard it in the decision of the case in this court. It is, perhaps, correct that evidence of other fraudulent sales is not admissible for the purpose of showing that the sale to the plaintiff was effected by the fraud of the defendant.

II. It is insisted that the representations made by defendant were mere words of commendation or expressions of opinion as to the quality of his contrivance. In answer to this, we think it is enough to say that the evidence satisfies us that the defendant induced the plaintiff to enter into the contract by such false representations as the law regards as sufficient to avoid a contract, and that his representations were of such a positive character as to amount to a warranty.

III. It is insisted that a motion made by the defendant to exclude certain depositions should have been sustained. This motion was based upon the ground that said depositions were taken by the plaintiff after the time fixed by an agreement of the parties within which the taking of testimony should be closed. There was no error in this ruling, because the record shows that the court gave the defendant ample time to take additional evidence after the motion was disposed of, and before the trial.

IV. We will not review the testimony of the witnesses. It is not our practice to do so. The evidence in this case establishes about the following state of facts: The patent-right in question was a worthless contrivance, by the sale of which the defendant succeeded in deceiving and defrauding the

plaintiff. His invention could not be made to work on any ordinary sulky cultivator, as he claimed and represented it could. It required a great weight upon the end of the tongue to hold it down, and in testing it he deceived his victims by using an iron neck-yoke, weighing from forty to sixty pounds, which was painted so as to resemble wood. He hired and paid men to assist in defrauding their neighbors. It is claimed that, as the plaintiff saw the machine tested, his eyes were his market, and that he had no right to rely upon any representations. It is a matter of wonder that some people have not learned that a useful and valuable invention is not hawked about the country and sold by counties and townships, and payment taken in all sorts of unsalable property. But the law will not allow one committing a fraud of this kind to protect himself by the claim that his victim was easily deceived, and did not act in the matter with reasonable prudence.

AFFIRMED.

THE BANK OF MONROE ET AL. V. GIFFORD ET AL.

65	648
121	222
65	648
126	677
65	648
142	355

1. **Injunction: ACTION ON BOND: WHEN IT ACCRUES.** Although a preliminary injunction may be dissolved upon motion before the final hearing upon the merits, an action for damages upon the bond will not lie until after the final hearing; because it may be that on the hearing upon the merits an injunction may yet be ordered, and thus it may appear that, notwithstanding the interlocutory dissolution, the injunction was not wrongfully sued out, and that there is no ground for an action on the bond.

Appeal from Jasper Circuit Court.

WEDNESDAY, APRIL 8.

THIS is an action to recover damages upon an injunction bond. There was a demurrer to the petition, which was sustained. Plaintiffs appeal. The facts appear in the opinion.

Winslow & Varnum and *J. Kipp & Son*, for appellants.

John F. Lacey and *A. Clark*, for appellees.

ROTHROCK, J.—It appears from the averments of the petition that the defendant, Gifford, made a promissory note, and that the plaintiffs were the holders of the same. Gifford claimed that the note was void for some reason, which is not stated, and he commenced an action against the plaintiffs, and procured a temporary injunction restraining them from negotiating, selling, assigning, or indorsing the note. All of the defendants signed the bond required to be given upon the issuance of the injunction. A motion was made by the plaintiffs herein to dissolve the injunction. A hearing was had on the motion, and the injunction was dissolved; it having been determined and adjudged that the same was improperly granted, and the writ wrongfully issued. This action was brought upon the bond, and the demurrer is upon the following grounds: “(1) The petition does not show that the cause of action upon which plaintiffs claim has accrued. (2) The petition does not show that the original action, in which it is alleged that defendant sued out the injunction, has been tried or disposed of, or that any final judgment has been rendered therein.”

The question is, did a right of action arise at once upon the dissolution of the temporary injunction? It was held by the court below that the right of action was not complete until the final disposition of the injunction cause. In section 1649 of High Inj., it is said that “the general rule is that upon the dissolution of an injunction, and a failure upon the part of the obligors to comply with the conditions of the bond, a right of action at once accrues. * * * It has been held, however, that no action at law can be maintained upon the bond until the final determination of the cause in which the injunction issued, even though the injunction has been dissolved upon appeal, and the cause remanded for further proceedings, since complainant is still entitled to pro-

Auer v. The City of Dubuque.

ceed with his action, and may, on final hearing, establish his right to an injunction." As sustaining the rule that upon the dissolution of the injunction an action may be brought at once, the author cites *Railroad Co. v. Hayward*, 4 Fla., 411, and *Sizer v. Anthony*, 22 Ark., 465.

We think that the rule that no action accrues until the final determination of the injunction suit is much the better practice. Suppose that, on the final hearing on the merits, it is adjudged that the holders of the note be enjoined from negotiating or indorsing it, would an action then lie upon the bond, and what would be the measure of damages? The plaintiff in the injunction case is not deprived of his right to demand an injunction upon the final hearing, because the temporary writ has been dissolved on motion, and, if he is entitled to an injunction under the proofs made on the final hearing, there can be no action upon the bond, because the final decree necessarily determines that the preliminary injunction was rightfully granted. In support of our conclusion, see *Bemis v. Gannett*, 8 Neb., 236; *Dowling v. Polack*, 18 Cal., 625; *Penny v. Holberg*, 53 Miss., 567. We think the demurrer to the petition was correctly sustained.

AFFIRMED.

AUER V. THE CITY OF DUBUQUE.

65	650
122	97

1. **Constitutional Law; TAXATION: RIGHT TO NOTICE AND HEARING: DUE PROCESS OF LAW.** If there is or can be any ground upon which a tax can be upheld which has been levied without notice to the tax-payer, and without an opportunity to be heard, it is incumbent upon the party claiming its validity to show that a notice would have been unavailing on account of the want of discretion in the persons clothed with the power to make the assessment and levy, or for some other reason; and, as such showing has not been made in this case, the tax must be declared invalid. Compare *Gatch v. City of Des Moines*, 63 Iowa, 718, and *Trustees of Griswold College v. City of Davenport*, ante, p. 633.

Appeal from Dubuque Circuit Court.

WEDNESDAY, APRIL 8.

THIS is an action in *certiorari*, by which the plaintiff seeks to annul and set aside a special tax levied upon his property to pay for paving part of one of the streets of the city. It is averred in the petition that the tax was assessed and levied without any notice to the plaintiff, and without any opportunity being given him to appear and be heard in relation thereto. A writ of *certiorari* was issued, and upon a return thereto the cause was tried by the court, and a judgment was rendered annulling the assessment and levy. Defendant appeals.

D. J. Lenehan, for appellant.

Henry Michel, for appellee.

ROTHROCK, J.—It appears from the record before us that on the second day of July, 1883, the city council of the defendant passed a resolution ordering that a part of Brad street in said city should be graded, curbed, guttered and macadamized, and that the city engineer should make the necessary plans and specifications for said improvements, and that the city recorder should give notice for bids and proposals for the performance of the work; “the guttering, curbing, and macadamizing to be done at the expense of the abutting property.” The contracts were let and the work done, and on the first day of October, 1883, the city council levied a tax of \$127.83 upon a lot owned by the plaintiff, and which abutted on that part of the street where the improvement was made. The plaintiff had no notice that a levy would be made upon his lot, and had no opportunity given him to appear before the council and be heard in relation thereto. The ordinance of the city authorizing the levy of taxes for such improvements made no provision for notice to the owners of property of the time and place of the levy.

The court below followed the case of *Gatch v. City of Des Moines*, 63 Iowa, 718. The decision in that case has since been vigorously assailed in the case of *Trustees of Griswold*

College v. City of Davenport, ante, p. 633. A rehearing was granted in the last-named case, and the original opinion was adhered to, upon the ground that, under the ordinance of the city of Davenport authorizing the levy, the ascertainment of the amount of the tax was not necessarily a mere mathematical calculation, but judgment and discretion were required to be exercised by the city council in determining whether part or all of the cost of the improvement should be assessed against adjacent lots and lands, and that the case, therefore, differed in no essential respect from that class of cases where the cost of an improvement is to be apportioned among property owners according to benefits.

In the case at bar, it was incumbent on the defendant to show by its return to the writ, and upon the trial, that the tax in question was such that a notice to the owner, and an opportunity to be heard before the levy became conclusive upon him, would have been of no avail to him. No such showing was made. All that is shown is that there was an ordinance which authorizes the cost of the improvement to be levied upon the abutting property. It does not appear whether the levy was required to be made according to the area of the lots, or to the lineal feet front, or to the value of the lots, or whether the council had any discretion in regard to how the levy should be made. In view of the legislation of this state from the beginning, as shown in *Gatch's Case*, if there is or can be any ground upon which a tax can be upheld which has been levied without notice to the tax-payer, and without an opportunity to be heard, it is incumbent upon the party claiming its validity to show that a notice would have been unavailing. In this case it is impossible to ascertain from the levy itself how or in what manner the amount of the tax was ascertained.

AFFIRMED

WOLFENDEN V. BARRY.

1. **Statute of Limitations: ACTION, WHEN BEGUN: HANDING NOTICE TO SHERIFF: INTENTION OF SERVICE ABANDONED.** Although the delivery of an original notice to the sheriff, with intent that it shall be served immediately, is a commencement of the action for the purposes of the statute of limitations, (Code, § 2532,) yet such intent must be *continuous* until the service is effected. And so, where a notice was placed in the sheriff's hands, who neglected to serve the same, but afterwards returned it to plaintiff's attorney, who lost it, and nearly two years later another notice was drawn and served, and the defendant thus brought into court, *held* that the action was not begun with the delivery of the first notice to the sheriff, and that, the period prescribed by the statute of limitations having expired before the second notice was placed in the sheriff's hands, the action was barred.

Appeal from O'Brien District Court.

WEDNESDAY, APRIL 8.

ACTION upon two promissory notes, one of which became due November 25, 1871, and the other November 25, 1872. The defendant pleaded the statute of limitations, and the plea was sustained, and judgment was rendered against the plaintiff for costs. He appeals.

Milt. H. Allen, for appellant.

J. B. Dunn, for appellee.

ADAMS, J.—The facts appear to be substantially as follows: The petition was filed November 1, 1881, and on the same day a notice was put into the hands of the sheriff for service. He neglected to make service of the notice, and afterwards made a return thereon to the effect that the same had not been served, and delivered the notice to the plaintiff's attorney, who lost the same. Nearly two years later another notice was drawn and put into the hands of the sheriff, and was duly served, and is the notice upon which the defendant was brought into court.

The question presented is as to when, under the statute, the action should be held to have been commenced. It is undisputed that, if the first notice had been duly served, the action should be held to have been commenced when such notice was delivered to the sheriff for service, which was before the action upon either note was barred. Section 2532 of the Code provides that "the delivery of the original notice to the sheriff * * * with intent that it shall be served immediately, which intent shall be presumed unless the contrary appears, * * * is a commencement of the action." The plaintiff's position is that the action was commenced when the first notice was delivered to the sheriff, and that, having been commenced, it is immaterial whether that particular notice was served or not, or when the notice was served upon which the defendant was brought in. But in our opinion the plaintiff's position cannot be sustained. It seems to us to be manifest, from the very nature of the case, that the "intent" in regard to immediate service of the notice, which the statute contemplates, should be a *continuing* intent. When the intent is abandoned before service, we do not think it can be treated as having any legal effect. If, for instance, the notice, though delivered with the intent that it should immediately be served, should be immediately recalled and permanently withheld, we do not see how the action could be regarded as commenced. Now the case at bar is not essentially different. Nearly two years, and three or four terms of court, were allowed to elapse, during which time the plaintiff had no intention that immediate service should be made. The intention of having *immediate* service made was abandoned, and such abandonment had the effect, we think, to nullify the original intent, as any other intent is nullified which is abandoned before carried into execution. It does not appear to us to be material what motive the plaintiff may have had for withholding notice until after several terms of court went by. It may be, as suggested, that negotiations for a settlement

The Central Trust Co. et al. v. Sloan et al.

were pending. But if this were so it would only show the more clearly that the intention of having immediate service made was abandoned. It is, perhaps, not material that the first notice was not served, or that the defendant was not brought in at the first term. He might have been brought in at a later term and upon a different notice, and it would probably have been sufficient if there had been nothing to show an abandonment of the intention to have immediate service made. But, under the facts of this case, we must hold that there was such abandonment, and the judgment must be

AFFIRMED.

THE CENTRAL TRUST COMPANY ET AL. V. SLOAN ET AL.

1. **Mortgage:** MORTGAGEE BOUND BY DECREE AND ORDER ON WHICH MORTGAGOR'S TITLE IS BASED. The Central Iowa Railway Company took the title to its property under a decree and order of the circuit court of the United States, which bound it to pay defendants' claim. (See *Sloan v. Central Iowa R'y Co.*, 62 Iowa, 723.) Afterwards, but before defendant had put his claim into judgment against the railway company, it mortgaged its property to the plaintiff trust company. *Held* that the trust company knew, or was bound to know, that the title of the railway company was based on the decree and order, and that its mortgage was inferior as a lien to defendant's judgment.
2. **Railroads:** CODE, § 1309: CONSTITUTIONALITY: SPECIAL LEGISLATION. Section 1309 of the Code, which provides that a judgment against any railway corporation for any injury to any person or property shall be a lien on the company's property, prior and superior to the lien of any mortgage or trust deed executed since the fourth day of July, 1862, *held* not to be repugnant to § 6, article 1, or § 12, article 8, of the constitution of Iowa, nor to the fourteenth amendment to the constitution of the United States, as being special legislation. Compare *Bucklew v. Central Iowa R'y Co.*, 64 Iowa, 603.

Appeal from Poweshiek Circuit Court.

WEDNESDAY, APRIL 8.

THE petition states that the defendant, Sloan, recovered a judgment in the circuit court in January, 1882, which, he claims is a superior and prior lien on the property of the railroad company to a mortgage executed to the trust com-

The Central Trust Co. et al. v. Sloan et al.

pany about two and one-half years prior thereto. It is further stated that the judgment was recovered for damages sustained by Sloan for a personal injury received by him while he was in the employ of a receiver, who was operating the road under the authority of the circuit court of the United States. It is further stated that the Central Railway Company was not organized and did not own the railway at the time Sloan was injured, and that the railway company purchased the road under a decree and sale ordered by the circuit court of the United States, and that the decree made no provision requiring the purchaser of the road to pay debts or liabilities against it; but that, subsequently to the entering of the decree, and at the time of confirming the sale, said circuit court made an order, which is stated at length in the petition, whereby Sloan claims that said court directed the railway company to audit and pay said claim. But plaintiffs claim that said order should not be so construed; and, if it should be, that the plaintiffs are not bound thereby. It is further stated in the petition that Sloan had caused an execution to issue on said judgment, and had levied on certain property of the railway company which was included in a mortgage given to the trust company. An injunction was asked, restraining the sale of such property. There was a demurrer to the petition, which was sustained, and the plaintiffs appeal.

J. H. Blair and A. C. Daly, for appellants.

H. W. Gleason, for appellees.

SEEVERS, J.—I. A construction was placed on the order of the circuit court of the United States above referred to in the case of *Sloan v. Central Iowa R'y Co.*, 62 Iowa, 728. The order is there sufficiently set out. It was there determined that the order included the claim of Sloan, and that, as the railway company accepted the road and property

1. MORTGAGE: mortgagee bound by decree and order on which mortgagor's title is based.

under the order, it was bound by the conditions which constituted a vital part of the order. We are not disposed to depart from such ruling, but adhere thereto. The trust company knew, or was bound to know, that the title of the railway company was based on the decree, and the order made when the sale was confirmed. It accepted the mortgage subject to such debts and liabilities as the federal court had made the prior and paramount lien on the property mortgaged to the trust company.

II. At the time the mortgage to the trust company was executed, there was in force a statute in these words: "A judgment against any railway corporation for any injury to any person or property shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed executed since the fourth of July, A. D. 1862." Code, § 1309. It is insisted that this statute is in conflict with section 6, article 1, and section 12, article 8, of the constitution of this state, and also in conflict with the fourteenth amendment of the constitution of the United States. It is said the statute under consideration is unconstitutional for the same reasons which were urged in *Bucklew v. Central Railway Co.*, 64 Iowa, 603, against the constitutionality of section 1307 of the Code. So far as the constitutionality is concerned, there is no difference between the two sections.

For the reasons briefly stated in the case just cited, we are of the opinion that the statute under consideration is not in conflict with either the constitution of this state or the fourteenth amendment of the constitution of the United States.

AFFIRMED.

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65	658
113	301
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143	100

CROWLEY V. THE BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y CO.

1. **Railroads: UNLAWFUL SPEED IN CITY: PERSONAL INJURY: PROXIMATE CAUSE: QUESTION FOR JURY.** Although it appears that the plaintiff in this case, who was employed in cleaning ice and snow from defendant's track, saw the car coming by which he was struck, and had got out of its reach, but, on account of slipping and falling, he was struck and injured, yet, where the evidence further showed that the car was moving at a rate of speed forbidden by the ordinances of the city in which the accident occurred, *held* that it could not be said as a matter of law that the unlawful rate of speed was not the proximate cause of the injury, and that the trial court properly submitted that question to the jury.
2. —: **MEASURE OF DILIGENCE REQUIRED OF EMPLOYEE IN WATCHING FOR CARS.** An employee working at his post on a railroad is not held to the same measure of diligence in looking for approaching trains as a traveler who is about to cross the track.
3. —: **ORDINANCE REGULATING SPEED: CONSTRUCTION OF.** An ordinance regulating the speed of railway trains in a city should not by construction be limited in its application to those portions of the city used by the public. Such ordinances apply to switch-yards as well.
4. —: **PERSONAL INJURY: NEGLIGENCE: PLEADING: EVIDENCE: INSTRUCTION.** In an action for a personal injury to an employee through the negligence of a railway company, it is not necessary to allege that, though plaintiff was negligent, yet the defendant might have avoided the injury by the exercise of reasonable care, in order to justify the admission of evidence and an instruction based on that theory.
5. **Evidence: PREPONDERANCE OF: INSTRUCTIONS.** Instructions in regard to the preponderance of evidence, which stated that "witnesses are weighed, not counted," *held* correct, when taken all together.

Appeal from Benton District Court.

WEDNESDAY, APRIL 8.

THE plaintiff seeks to recover damages by reason of the alleged negligence of the employees of defendant, whereby plaintiff was struck and injured by a moving car. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals.

Crowley v. The Burlington, Cedar Rapids & Northern R'y Co.

J. & S. K. Tracey, for appellant.

Bowman & Swisher, for appellee.

ROTHROCK, CH. J.—The plaintiff was employed by the defendant as a laborer in cleaning snow and ice from its tracks and switches, and he claims that on the ninth day of February, 1881, while so employed in the yard of defendant at the city of Cedar Rapids, the defendant negligently caused one of its cars, with great force, and at a speed in violation of the ordinances of said city, to strike plaintiff, and to run on and over his right arm, by which he was greatly injured, and that such injury was received without any negligence on his part.

1. RAIL-
ROADS:
unlawful
speed in city:
injury to em-
ployee: prox-
imate cause:
question for
jury.

The answer, in addition to a general denial, avers that if plaintiff was injured by a moving car it was by his own want of proper care and caution, in not looking and listening for moving cars, and in not keeping out of the way of such cars.

The plaintiff was a witness upon the trial, and his testimony, as abstracted by appellant, is as follows:

"I am plaintiff in this suit; am fifty-one years old, and live at Cedar Rapids. At the time of the accident, I was working for defendant as a section hand in its yards at Cedar Rapids, cleaning out snow from the switches. There was a little ditch at the switch I was cleaning out, so the water could run through. Just before I got hurt, I was standing outside of the track, between it and a snow bank, which was three or four feet high, at the side of the track, cleaning this ditch. I always looked every once in a while. I was very careful and looked out for myself, because I was a little hard of hearing, and it made me more cautious to look out. It had been thawing, the snow had melted, and the water was running. The accident happened in the afternoon at about three or four o'clock. A car came along, and was pretty close to me when I raised my head and looked. I then jumped to

get out of the way of the car, and my foot slipped or caught in some way, I can't tell how, and before I could get out of the way the car came up and hit me, knocked me down on my face and hands, and broke my arm in three places. I had been working for the company about four years. At the time I got hurt I was getting one dollar and twenty-five cents per day. My arm is very painful yet, and I suffered awfully, and can hardly do anything at all.

"I had been working about two months in this yard before I got hurt. There is a great deal of switching done there in the yard, and cars are moved up and down constantly, and hence it is a dangerous place to work, unless you look out and watch. At the time, I was cleaning the snow out of the track and this little ditch, and was standing on the west side of the track, between the snow bank and the track. The track is nearly straight there. You can look down the track (south) some two or three hundred yards. You can see the track down to the switch target. I did not see this car coming until it was close onto me. Then I attempted to get away from the track, and my foot slipped and the car struck me. I was outside of the track, between it and the snow bank, when I slipped and fell."

The plaintiff, in an additional abstract, sets forth the following as an amendment to his testimony:

"During February, 1881, at the time I got hurt, I was section hand or repair-man on the B., C. R. & N. R'y, and my run was from Cedar Rapids to Linn Junction. I went out on the line on a hand car. I was under the direction of an overseer or boss. I was directed by the boss on the morning of February ninth to clear the switches on the track, so that the water would go from the switches. When I was clearing out the switches, there was a bank of snow beside the track. I was cutting a drain through the bank of snow to let the water from the switch into the street. At the time the car struck me, as near as I can remember, I was standing with my face towards the track, on the outside, kind of half

Crowley v. The Burlington, Cedar Rapids & Northern R'y Co.

towards the track—in between the track and bank of snow. The bank of snow was between three and four feet high. The water was running that day. I was out in the middle of the afternoon, about three or four o'clock."

The foregoing was all the testimony given by plaintiff as to the cause of the accident, and all of the witnesses testified substantially to the same facts. There was a conflict of evidence as to the speed with which the car was moving at the time of the accident, but the jury was warranted in finding that it was running at the rate of from ten to twelve miles an hour. By an ordinance of the city, which was introduced in evidence, no car or engine was permitted to run along any railroad track in the city at a greater rate of speed than six miles per hour.

At the close of the introduction of plaintiff's evidence, the defendant moved the court to direct the jury to return a verdict for the defendant. The motion was overruled. The defendant excepted to the ruling, and now claims that it was erroneous.

It is claimed that the evidence shows that the plaintiff was outside of the track, and away from danger, and that he slipped and fell on the snow and ice, and thus came in contact with the car; and it is urged that the speed of the car was not the proximate cause of the injury, but that it was caused by the plaintiff's slipping and falling after he was out of danger.

We do not regard the evidence as at all clear upon this point. It does not appear that the plaintiff was run over by the wheels. He received his injury by a collision with some part of the car. But, if we were to concede that he was out of danger, and slipped, and thus came in contact with the car, we do not think that it can be said that the speed of the car was not the cause of the injury. It is not claimed that the company was negligent in allowing the snow and ice to remain so near the track; but those alone would not have created the danger. If such snow banks and ice must exist

in close proximity to the track, and where the employes of the company must do their work, there is the more necessity for a prudent movement of the trains and engines among them. The plaintiff testified as follows: "I jumped to get out of the way of the car, and my foot slipped or caught in some way." We think it was a fair question for the jury whether, if the car had been moving at a proper rate of speed, the plaintiff might not have moved out of the way with such deliberation and care that he would not have fallen. If a horse is improperly driven upon a street, and a person who is near being run over jumps to get out of the way, and unintentionally steps upon ice and slips, and is run over, it cannot be said as matter of law that the improper speed with which the horse was driven was not the proximate cause of the accident. It is true that the accident might have happened if the car had been allowed to approach him only at a proper rate of speed. No one can determine with certainty how it would have been. We think that was a question to be determined by the jury, in view of all the circumstances shown.

Again, it must be remembered that the plaintiff did not bear the relation of a stranger to the defendant. He was not

2. —: on the track, and in a place of danger, for his
 measure of
 diligence re-
 quired of em-
 ploye in
 watching for
 cars. own convenience, curiosity or pleasure, nor even
 as a traveler at a crossing. He was an employe
 of the defendant, and was at his post of duty.

There was a great deal of switching done in the yard, and the evidence shows that "cars are moved up and down constantly," and that it is a dangerous place to work. The plaintiff's duty required him to do the work he was placed there to perform, and he had the right to suppose that the defendant would exercise care to avoid sending cars along the track at an inordinate and unlawful rate of speed. In *Olinger v. N. Y. Central & Hudson R. R'y Co.*, 4 Hun., 159, it is held that the rule which requires a traveler, about to cross a railway track, to look in both directions for approaching trains, is not applicable in its strictness to an employe at

work on the track, because such an obligation would be inconsistent with his proper attention to his work. In *Good-fellow v. B. & H. & E. R'y Co.*, 106 Mass., 461, the plaintiff was in the employ of a contractor at work for the defendant. He was holding the guy of a derrick, and an engine backed down and injured him. At the trial, a verdict was directed for the defendant, and the ruling was reversed. The court said:

"There is evidence that he was rightfully where he was, and was not in fault in being engrossed in his work, and unaware of the approach of the engine until it was too late to avoid it." We do not think the court erred in overruling the motion.

II. It is further claimed that the court erred in instructing the jury that the ordinance restricting the running of cars in the city at a rate of speed not more than six miles an hour applied to the switch yards of the defendant. It is said that the ordinance is applicable only to that part of the city used by the public. This would limit the operation of the ordinance to such places as the public have a right to travel, which would include only public crossings. We do not think it should be so limited in its application.

There are other objections to instructions given, and to the refusal to give instructions asked, which we do not deem it necessary to discuss in detail. None of them appear to us to be well taken. We think that the case was fairly tried and presented to the jury, and that the verdict is fully supported by the evidence.

AFFIRMED.

SUPPLEMENTAL OPINION.

ROTHROCK, J.—I. After the foregoing opinion was filed, a petition for rehearing was presented, in which counsel

4. ———: per- insists that this court should pass upon two
sonal injury: assignments of error more specifically than is
negligence: done in the closing paragraph of the opinion.
pleading: evidence: in-
struction.

The first of these objections is based upon the following instruction given by the court to the jury: "(4) If you should find from the evidence that the plaintiff was negligent, still the defendant could not escape liability, if the act which caused the injury was done by defendant after it discovered plaintiff's negligence, if you should find from the evidence that defendant could have avoided the injury in the exercise of reasonable care." It is not claimed that this instruction is an incorrect statement of the law, but it is insisted that there is neither averment nor proof that the defendant could have prevented the injury after the discovery of plaintiff's negligence. We do not think such an allegation is necessary to be made in the petition. It is a phase of the rights and obligations of the parties which arises upon the proofs rather than by pleading. We know of no rule of pleading which requires the plaintiff in actions of this character to confess negligence on his part, and avoid it by alleging that the defendant might have averted the injury by using proper care after the discovery of plaintiff's peril. The objection that there was no evidence to support the instruction does not appear to us to be well taken. There was evidence in the case to the effect that one Smith, a brakeman, saw the plaintiff, and called to him to warn him of the approach of the car, but made no effort to check its speed.

II. The other objection is made to the following instructions given to the jury: "(9) In law, a preponderance of evi-

5. EVIDENCE: dence signifies the greater weight of testimony, and
preponder- does not mean the greater number of witnesses.
ance of: in-
structions.

In other words, witnesses are weighed, not counted.

(10) You are the sole judges of the weight of the testimony, and of the credibility of the witnesses. If there is a conflict, you will reconcile it, if possible to do so. If you cannot do so, you will then award credit to those witnesses and that

The Commercial Exchange Bank v. McLeod.

testimony which you believe, as reasonable men, under all the circumstances of the case, worthy thereof, and reject such as you believe to be unworthy thereof. Consider the whole case and all the evidence carefully, and under the evidence and these instructions return that verdict which you believe to be warranted."

It is claimed that the proposition that the weight of testimony does not mean the greater number of witnesses, and that witnesses are weighed and not counted, are incorrect statements of the law. We think that instruction No. 9 might well have been made a little more specific by stating that the weight of the testimony is not *necessarily* with the greater number of witnesses. But when both instructions are considered together, they plainly imply that this is what was intended by the court, and we think the jury was not misled. They surely would not be authorized under these instructions to reject the testimony of two or more credible witnesses, against the testimony of one equally credible, without some good reason for so doing.

The petition for rehearing is overruled, and the judgment
AFFIRMED.

THE COMMERCIAL EXCHANGE BANK V. McLEOD.

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117	665

1. **Attachment:** OF PROPERTY TAKEN FROM PERSON OF PRISONER: OFFICER'S RIGHT TO SEARCH AND TO RETAIN PROPERTY. An officer making an arrest, or a jailor upon committing a person to jail, may search him, and take from him not only all offensive weapons, but also all other property which might be used by him in effecting an escape. But where the sheriff upon committing the defendant to jail took from his person two watches and some money, which were in no way connected with the crime with which he was charged, and which could not be used as evidence in the prosecution, it was his duty to return them, and while he retained them his possession was that of the prisoner, and they were no more subject to attachment in an action against the prisoner than if they had been in his pockets. *Reifsnyder v. Lee*, 44 Iowa, 101, distinguished.

2. ———: ———: CONSENT OF PRISONER TO SEARCH: FACTS NOT AMOUNTING TO. In such a case, the consent of the prisoner to the search and to the taking of the property by the officer cannot be inferred from the fact that he made no resistance thereto.

Appeal from Worth District Court.

WEDNESDAY, APRIL 8.

THIS is an action to discharge two watches and certain money from an attachment which was levied thereon at the suit of the plaintiff against the defendant. A hearing was had upon affidavits, and the motion was sustained, and the watches and money were ordered to be discharged from the attachment. Plaintiff appeals.

Blythe & Markley, for appellant.

Glass & Hughes, for appellee.

ROTHROCK, CH. J.—On the thirty-first day of January, 1883, the plaintiff commenced an action against the defendant and others upon a promissory note. It was alleged in the petition that defendants had disposed of their property in part with intent to defraud their creditors, and a writ of attachment was prayed for and issued, which was placed in the hands of the sheriff for service. The plaintiff is a partnership, and H. P. Kirk and I. R. Kirk are the individual members thereof. On the twenty-eighth day of August, 1883, said I. R. Kirk made and filed an information before a justice of the peace, charging the defendant with the crime of uttering a forged promissory note. A warrant was issued, and the plaintiff was arrested by a constable and taken to the county jail. Upon his commitment to the jail, the sheriff, who was the keeper thereof, proceeded to search the defendant's person, and took therefrom one gold watch, one silver watch, and \$480 in money, and, having the attachment and money and property all in his hands, he made

1. ATTACHMENT: of property taken from person of prisoner: officer's right to search and to retain property.

return that he had levied the attachment on the watches and money.

Section 4212 of the Code provides: "He who makes an arrest may take from the person all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken, to be disposed of according to law." We do not think that an officer making an arrest is precluded by this statute from taking from the person of the prisoner any other property than "offensive weapons." An officer making an arrest, or a jailor upon committing a person to jail, may search him and take from him all property which might be used by the prisoner in effecting an escape. In *Reifanyder v. Lee*, 44 Iowa, 101, the defendant stole five head of cattle, and sold them to the plaintiff for \$162.30. The owner of the cattle claimed and recovered them from plaintiff, and the plaintiff procured officers to pursue and capture the thief. The officers making the arrest searched his person, and took therefrom certain money, and a watch which was of little value. It was held that the money and watch were liable to garnishment in the hands of an officer at the suit of plaintiff. In that case the search of the person was fully approved. It is said, however, in the opinion, that "a party to a suit can gain nothing by fraud or violence under the pretense of process, nor will the fraudulent or unlawful use of process be sanctioned by the courts. In such cases parties will be restored to the rights and position they possessed and occupied before they were deprived thereof by the fraud, violence or abuse of legal process." To the same effect, see *Pomroy v. Parmlee*, 9 Iowa, 140, and *Patterson v. Pratt*, 19 Id., 358.

We think the sheriff was justified in making the search, and in taking from the person all money or property which was in any way connected with the crime charged, or which might serve to identify the prisoner. If, however, the sheriff knew that the watches and money were in no manner connected with the crime, and that they could not be used in

any way as evidence in the prosecution, we think it was his duty to return them to the defendant. If a constable or other officer takes possession of property found on a prisoner, the court will order the same to be restored, if not required as a means of proof at the trial, or which does not finally appear to be the fruits of the crime with which he stands charged. 1 Archib. Crim. Pl. and Pr., 34, 35.

In the case of *Reifsnnyder v. Lee*, *supra*, it is said, there was "ample ground to hold that the money taken from Lee was the money which he had procured from plaintiff for the stolen cattle."

In the case at bar, it is not claimed that the sheriff had any right to retain the money and watches for any purpose connected with the arrest or with the crime charged. It is claimed, however, that the defendant consented that the sheriff might take possession of the same and keep them for him. This is denied by the defendant, and there was a conflict of evidence upon this point, and it cannot be said that the court was not warranted in finding that the property and money were taken without the consent of defendant. Where a party submits to a search of his person by an officer, it cannot be said that the search was with his consent, because he makes no physical resistance; and, when the search is completed and the fruits thereof are retained by the officer, it would require a strong showing to hold that this was with the consent of the prisoner.

We think that it cannot be said that the search was unlawful. But when it was ascertained that the money and property were in no way connected with the offense charged, and were not held as evidence of the crime charged, the personal possession of the sheriff should be regarded as the personal possession of the prisoner, and the money and property should be no more liable to attachment than if they were in the prisoner's pockets. To hold otherwise would lead to unlawful and forcible searches of the person under cover of

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criminal process, as an aid to civil actions for the collection of debts. It does not appear that such was the purpose of the prosecution in this case, but the court was justified in finding that the money and property were taken from the defendant by force and without his consent, and, as it is not claimed that the money or property was in any way connected with the crime charged, no advantage should be taken of the defendant because the same was taken from his person by force and against his will.

AFFIRMED.

ON REHEARING.

SEEVERS, J.—A more particular statement of the facts than is set forth in the foregoing opinion may be beneficial. The attachment was issued in July. In August the information was filed, charging that the defendant, Ridgway, had committed the crime of uttering a forged promissory note. The defendant was searched, and the money and watch taken from his person by the officer, and in September the money and watch were attached. The court was warranted under the evidence in finding that the money and watch had no connection with, and that they were not fruits of, the crime charged. The search was justifiable, and possibly the officer, in his discretion, could retain, for a time at least, the property, if thereby the defendant might be aided in effecting his escape, or if it would tend to connect him with the commission of a crime. But the possession of the officer was the possession of the defendant. This is the undoubted rule, as appears from the authorities cited in the foregoing opinion, and it is sustained also by the following: Whart. Crim. Pl. & Pr., § 61; 1 Bish. Crim. Pr., §§ 210, 211, 212. The foregoing rule of the common law may, of course, be changed by statute; but this has not been done, and therefore the rule above stated must prevail.

Reifsnnyder v. Lee, 44 Iowa, 101, cited in the foregoing opin-

ion, and on which the appellant relies, is clearly distinguishable. In that case the defendant was charged with the larceny of cattle, and it is said in the opinion "there is ample ground to hold that the money taken from Lee was money which he procured from plaintiff for stolen cattle." The money was obtained by the commission of the crime, and as the officer was authorized to make the search, his possession of the money was lawful, and it could be attached and appropriated by the party from whom it had been unlawfully obtained. The foregoing opinion is adhered to.

BROADSTREET V. CLARK, DEFENDANT, AND THE CHICAGO, MILWAUKEE & ST. PAUL R'Y COMPANY, GARNISHEE.

65 670
87 568

1. **Garnishment: EXEMPTION LAWS OF OTHER STATES.** It is the settled rule that in a garnishment proceeding in this state the exemption laws of another state or territory cannot be pleaded or relied on as a defense by either the garnishee or judgment debtor. See cases cited in opinion.

Appeal from O'Brien Circuit Court.

WEDNESDAY, APRIL 8.

THE defendant railroad company was garnished as the supposed debtor of its co-defendant. Judgment was rendered against both defendants, and they appeal.

Geo. E. Clark, for appellant.

No appearance for appellee.

SEEVERS, J.—Upon being garnished, the railroad company answered that it was indebted to Clark, the judgment debtor, who was one of its employes in Dakota territory, and that he was a married man, and the head of a family, and a resident of said territory when the work and labor were performed for

which the indebtedness was incurred, and that the same had been earned within ninety days prior to the garnishment; that under the laws of said territory said earnings were exempt from execution. Clark, the judgment debtor, intervened in the garnishment proceeding, and in substance pleaded the same facts as above stated, and asked that the garnishee be discharged. Upon motion of the plaintiff, judgment on the answer of the garnishee and petition of intervention was rendered for the plaintiff, and we are required to determine whether the court erred in the rendition of such judgment.

We regard it as the settled rule in this state that the exemption laws of another state or territory cannot be pleaded or relied on as a defense by either the garnishee or judgment debtor. *Newell v. Hayden*, 8 Iowa, 140; *Leiber v. Union Pac. R'y Co.*, 49 Iowa, 688; *Mooney v. Union Pac. R'y Co.*, 60 Iowa, 346. See, also, *Burlington & M. R. R'y Co. v. Thompson*, 31 Kan., 180, and authorities there cited.

AFFIRMED.

65 671
107 158
1107 159

DUDLEY ET AL V. MCCORD ET AL.

1. **Habeas Corpus: CONTEMPT OF JUSTICE OF PEACE: REFUSAL TO MAKE AFFIDAVIT:** CODE, § 3962, 3963. Under § § 3962 and 3963 of the Code, a person is not bound to make an affidavit which is sought only as information on which to base a civil action; and in this case, where plaintiffs were committed by a justice of the peace for refusing to obey a subpoena, commanding them to appear before him to make an affidavit for such a purpose, they should have been discharged upon *habeas corpus*. *Robb v. McDonald*, 29 Iowa, 330, and *State v. Seaton*, 61 Id., 563, distinguished.

*Appeal from the order of Hon. H. C. Henderson, judge
of the Eleventh judicial district of Iowa.*

WEDNESDAY, APRIL 8.

THE plaintiffs, E. L. Dudley, E. H. Chapman, P. C. Eldridge and M. C. Healion, were restrained of their liberty by the defendant, George B. McCord, sheriff of Marshall county, and the defendant, H. D. East, deputy sheriff of Marshall county. Being so restrained, they made application to the Hon. H. C. HENDERSON for a writ of *habeas corpus*. The writ was granted, but upon hearing they were remanded. From the order remanding them they appeal.

R. A. Sankey and Brown & Carney, for appellants.

H. E. J. Boardman and J. H. Bradley, for appellees.

ADAMS, J.—The plaintiffs were committed to custody by one A. F. Haradon, a justice of the peace, for an alleged contempt of his judicial authority. The application for a writ of *habeas corpus* was based upon the allegation that the commitment was void, for the reason that the alleged contempt was merely the disobedience of an order, and the order was made in a matter in which the justice of the peace had no jurisdiction.

The question presented involves a construction of the following provisions of the Code, which are in these words:

“Section 3692. When any person is desirous of obtaining the affidavit of another, who is unwilling to make the same fully, he may apply to any officer competent to take depositions as herein declared, by petition, stating the object for which he desires the affidavit.

“Section 3693. If such officer is satisfied that such object is legal and proper, he shall issue his subpoena to bring the witness before him, and if he fails then to make a full affidavit of the facts within his knowledge to the extent required of him by the officer, the latter may proceed to take his deposition by question and answer in writing in the usual way, which deposition may afterwards be used as an ordinary affidavit.”

In August, 1884, one J. J. Higginson and one Elijah

Smith, claiming to be stockholders in the Central Iowa Railway Company, filed a petition before Haradon, as justice of the peace, averring that they were about to commence an action for an injunction against the company, to prevent the carrying out of certain pretended contracts, and also against the acting president and directors of the company, for the purpose of removing them from office. They averred in substance that, to enable them to obtain the information necessary for commencing the action, they needed and desired the affidavit of E. L. Dudley, E. H. Chapman, P. C. Eldridge and M. C. Healion. The application was granted, and a subpoena was issued and served upon the persons whose affidavits were desired. They did not obey the subpoena. Thereupon the justice issued a warrant, and caused the persons subpoenaed to be brought before him, to show cause why they should not be punished for contempt. They made answer that they were not under obligation to obey the subpoena, for reasons as follows: "*First*, because there is no proceeding in any court authorizing the justice to take the testimony of any of these parties; *second*, the petition confers no jurisdiction to cause a summons to issue for the arrest and commitment of the witnesses, and is wholly void." The justice, deeming the answer insufficient, adjudged the persons to be in contempt, and ordered that they be committed, as above set forth.

It was held in *Robb v. McDonald*, 29 Iowa, 330, and *State v. Seaton*, 61 Iowa, 563, that the justice might punish for contempt for a refusal to give an affidavit when subpoenaed, under the sections above cited, and that it was not competent for the person subpoenaed to set up that no legal use could have been made of the affidavit if it had been given. The ground upon which those decisions are based is that the justice has jurisdiction to pass upon the question as to whether the object for which the affidavit is sought is legal, and, if he judges it to be such, it is not for the witness to set up his judgment to the contrary, and refuse to obey the subpoena.

upon that ground. It is to be observed, however, that the decision in each of these cases was made by a divided court. It is to be observed, further, that in each there was an action pending, and the affidavit was sought for use in the action. Affidavits from these plaintiffs were not sought for use in an action, nor were they sought for any use for which there is any provision of law. They were sought for the mere purpose of information.

We are clear that the statute does not contemplate that persons can be forced to give affidavits which are sought merely for information. The statute provides that the witness may be brought before the officer, and that his *deposition* may be taken, and that the deposition may afterwards *be used instead of an ordinary affidavit*. The use referred to is manifestly a legal use as evidence, and the justice should refuse to issue a subpoena where affidavits are not ostensibly sought for such legal use, and also where, if ostensibly sought for such use, he should be satisfied that they were not desired for such use in fact. If Higginson and Smith's petition had expressly stated that the affidavits were not sought for any use contemplated by the statute, it would manifestly have been insufficient to invoke the jurisdiction of the justice; but we cannot regard the petition as essentially different. The use stated was, we think, not contemplated by the statute; and we cannot presume that the affidavits were sought for some use not stated. The petition, then, did not purport to come within the statute, and in this the case differs from those above cited. We are of the opinion, therefore, that the justice had no jurisdiction. It follows that these plaintiffs were illegally committed, and that their application to be released upon the writ of *habeas corpus* should have been sustained.

It remains to be stated that an application was made by the plaintiffs in this case to Mr. JUSTICE BECK, at chambers, to be released upon filing a *supersedeas* bond, and an order for their release was made. Afterwards, a motion was filed by the defendants in this court to vacate the order, on the

Willett, Adm'r, v. Malli et al.

ground that Mr. JUSTICE BECK had no power to make it. In the view which we have taken of the case, the motion is of no practical importance; and, without ruling upon its merits, we have to say that we think that it should be dismissed.

REVERSED.

WILLETT, 'ADM'R, v. MALLI ET AL.

65 675
e128 107

1. **Estates of Decedents: DISTURBANCE OF GIFT TO PAY EXPENSES OF ADMINISTRATION.** A gift made by the decedent in his life-time will not be disturbed and charged with the expenses of administering the estate, unless it be such expenses as may be incurred in setting aside the gift for some lawful purpose.
2. ———: **ALLOWANCE OF CLAIM: HOW FAR BINDING UPON HEIRS AND GRANTEEES OF DECEDENT.** The allowance of a claim against an estate in an action to which the heirs are not made parties is *prima facie* evidence, as against them, of the correctness and validity of the claim, in a proceeding to subject the real estate which they have inherited to its payment; but it is not conclusive. And such allowance is not even *prima facie* evidence against the heirs in a proceeding to subject real estate to the payment of the claim, on the ground, substantially, that the decedent in his life-time conveyed to them the real estate without consideration, and for the purpose of defrauding creditors; for as *granteees* they are in no way represented by the administrator.
3. **Former Adjudication; PARTIES TO: WHO ARE NOT.** The fact that defendants took counsel and contemplated the employment of attorneys to aid the administrator of their father's estate in resisting a claim against the estate, did not make them parties to the proceeding so as to constitute the allowance of the claim an adjudication binding upon them.

Appeal from Winneshiek District Court.

WEDNESDAY, APRIL 8.

THIS action in equity was brought by the plaintiff, as the administrator of the estate of Franz Malli, deceased, to subject to the payment of the debts of the estate certain real estate, the legal title to which is in the defendants. The court granted the relief prayed, and the defendants appeal.

Baylies & Baylies, for appellants.

Willett & Willett and Brown & Portman, for appellee.

ADAMS, J.—The plaintiff avers in his petition, in substance, that a claim has been allowed against the estate of his intestate for about \$1,400, in favor of one Christina Malli; that the expenses of administration amount to about \$500; that the claim and expenses are wholly unpaid; and that there are no legal assets of the estate. He further avers, in substance, that the land in question, standing in the defendant's name, is equitably liable for the payment of the claim and expenses; that the decedent in his life-time was the owner of certain notes, secured upon the land in question by a mortgage; that he assigned the notes and mortgage to his sons without consideration, and in fraud of his creditors; that they foreclosed the mortgage, and acquired the land in question through the foreclosure, and now hold the same subject to the liabilities of the estate. The assignees, with the exception of one who died, are made defendants. One Louise Schlenker is also made defendant, as having acquired an interest in the land since the foreclosure. The history of the claim of Christina Malli is set out in the opinion of Mr. Justice ROTHROCK in *Malli v. Willett*, 57 Iowa, 705. In the view which we have taken of the case, it will not be necessary to make a more specific reference to it.

I. The evidence shows that the assignment of the notes and mortgage by the decedent to his sons was substantially a gift. This being so, it is contended by the plaintiff that the land acquired through the foreclosure is chargeable as an equitable asset for the payment of the claim set out, and the expenses of administration. The defendants contend that the land at most is chargeable only for the payment of indebtedness existing at the time of the assignment, and they contend that the indebtedness which the plaintiff is seeking to charge

1. ESTATES OF
decedent :
disturbance
of gift to pay
expenses of
administra-
tion.

upon the land has arisen since the assignment. This, of course, is true, so far as the expenses of administration are concerned, and we think that as to them the defendant's position must be sustained. Our attention has been called to no case where a gift made by the decedent has been disturbed for the purpose of defraying such expenses. We do not say that the expense of subjecting the land might not be charged upon the land, but the expenses set out in the petition, are, of course, not of this class. They must be deemed to have accrued in administering upon other assets, and such expenses should, we think, have been paid out of such assets.

As to the claim of Christina Malli, it is unnecessary to consider when it arose. We think that there is no averment

2. ———: or evidence by which it can be charged upon this
allowance of land. The averment and evidence show merely
claim: how the allowance of the claim, and do not show that
far binding upon heirs and grantees of decedent. it was a valid claim independent of the allowance.
The plaintiff contends that the allowance is an adjudication; that it is binding upon the defendants; and that it is sufficient to plead it and prove it.

It may be conceded that the allowance of a claim is an adjudication, and, if fairly obtained, is binding upon the administrator, who is actually before the court, and upon the other creditors, who may be deemed to be represented by him. *Ashton v. Miles*, 49 Iowa, 568. But the defendants were not before the court, neither could they be deemed to be represented. They were not even heirs, so far as the land in question was concerned. Under the averments of the petition, they held it as a gift, and in fraud of creditors. The administrator, then, in defending the claim, did not owe them any duty, and, if this is so, it cannot be said that even an official defense was made in their behalf.

We are aware that a judgment rendered against a fraudulent grantor may be pleaded as conclusive against the fraudulent grantee. It was so held in *Strong v. Lawrence*, 58 Iowa, 55. But that case differs from the case at bar in this: the

judgment defendant was charged personally. Besides, a judgment is or may be made a lien upon the debtor's interest in real estate, legal or equitable. Where it becomes a lien upon the debtor's interest, (or upon what the courts may treat as such,) there is much reason for holding it conclusive as against all others who hold the real estate subordinate to such interest. What precisely the rule is as to the evidence which the probate allowance of a claim becomes as against heirs, it is not very important to determine. It is manifest that they sustain a relation to the administrator different from that of those who have taken property from the decedent by gift, and who are not necessarily interested as against the allowance. But the probate allowance of a claim is not, we think, so far as real property is concerned, conclusive even as against heirs. *Stone v. Wood*, 16 Ills., 177; *Mason v. Bair*, 33 Id., 206; *Steele v. Lineberger*, 59 Pa. St., 308; *Hopkins v. Stout*, 6 Bush, (Ky.) 375. It is held, it is true, in those cases that it is evidence, but only *prima facie* evidence. The plaintiff relies upon those cases, because the probate allowance is held to be *prima facie* evidence. But there are two difficulties in making those cases authoritative in the case at bar. To make them so, we should be obliged to hold that a rule applicable to heirs is applicable to persons who acquired property from the decedent by gift. Again, issue cannot properly be tendered and taken upon that which is merely evidence. The party relying upon the evidence should aver the fact of which it is evidence. In this case the allowance was pleaded as a verity and issue tendered thereon. What the defendants desired to contest was, not the fact of the allowance, but the correctness of the claim. As to that there was no issue; and, there being no issue in respect to it, no evidence was admissible in respect to it. Whether, if evidence had been introduced in respect to it without objection, and the case tried as if there was such issue, we could now properly reverse, we need not determine. Objection was made to all evidence offered. We see no way, then, in which the plaintiff can be

sustained, except by holding that the allowance was conclusive upon the defendants, and such ruling, it appears to us, would be unwarranted. In *Bump, Fraud. Conv.* 539, the author, while stating that the record of a judgment against the debtor is competent evidence against his grantee, says: "A judgment rendered against the debtor's administrator, whether domestic or foreign, is not competent evidence against the grantee;" citing *McDowell v. Goldsmith*, 24 Md., 214; *Baker v. Welch*, 4 Mo., 484; *Osgood v. Manhattan Co.*, 3 Cow., 612. See, also, *Donley v. McKiernan*, 62 Ala., 34; *Winslow v. Grindal*, 2 Greenl., (Me.) 64; *Beckett v. Selover*, 7 Cal., 215; *Buckham v. Grape*, *ante*, p. 535.

The plaintiff contends that the defendants are concluded by the allowance, because they made themselves parties to it by volunteering to resist it. We are inclined to

3. FORMER
adjudication:
parties to:
who are not.

think, though the evidence is not very clear, that the defendants took counsel, and contemplated the employment of attorneys to assist the administrator in resisting the claim. But no appearance was made for the defendants in the case, nor were their attorneys, if they had any, present at the trial. Whatever was done by the defendants, if anything, it appears to us, fell far short of making them parties to the allowance.

In our opinion the judgment must be

REVERSED.

STODDARD ET AL. V. SLOAN ET AL.

63	680
89	664

63	680
103	345

65	680
116	455

65	680
122	41

65	680
125	532

1. **Tax Sale and Deed: NOTICE TO REDEEM: POSSESSION: FACTS NOT AMOUNTING TO.** A person cannot be said to have possession of land, so as to be entitled to notice to redeem from a tax sale, who has only plowed two furrows on the land to see how it would plow.
2. ———: ———: **USE OF INITIALS FOR GIVEN NAME.** A published notice to redeem from a tax sale is not invalidated because only the initial letters of the given name of the person to whom the notice is addressed are used.
3. ———: ———: **DESCRIPTION OF LAND: JUDICIAL NOTICE OF TOWNSHIP AND RANGE.** A notice to redeem from a tax sale which described the land as being the southeast quarter of section 5, township 89, range 41, in Woodbury county and state of Iowa, sufficiently described the land as to township and range, since the court will take judicial notice that there is only one township in that county answering to the description.
4. ———: ———: **AFFIDAVIT OF PUBLICATION: SUFFICIENCY: TIME OF PUBLICATION.** The statute requires only three publications of a notice to redeem from a tax sale, and it is sufficiently complied with if the first publication is made after the lapse of two years and nine months from the day of sale, and the service is completed ninety days before the execution of the deed. The affidavit of publication in this case, accordingly, *held* sufficient.
5. ———: ———: **RESIDENCE OF PERSON NOTIFIED.** The affidavit of publication in such case need not state that the person notified is a non-resident of the county, nor other facts necessary to justify service by publication.
6. ———: ———: **SUFFICIENCY OF JURAT.** Where the affidavit of publication in such a case purported to be made by S., and his name was not only subscribed to it, but written in the body of it, and he states therein that he was sworn, and the jurat states that it was sworn to and subscribed before the notary whose name is attached, *held* sufficient to show that it was S. who was sworn, though his name does not appear in the jurat.
7. **Notary Public: JUDICIAL NOTICE OF JURISDICTION: OFFICIAL SIGNATURE.** Where an affidavit purported to be made in the county of W., and the jurat was signed by one who added the words "notary public" to his name, and affixed his notarial seal, though he did not state for what county he was notary public, *held* that it was sufficient, because the court will take judicial notice that he was a notary of the county of W. But in the case of acknowledgments the rule is different. See *Willard v. Cramer*, 36 Iowa, 22.

Appeal from Woodbury Circuit Court.

WEDNESDAY, APRIL 8.

ACTION to set aside a tax deed. There was a decree for the defendants. The plaintiffs appeal.

Fogg, Long & Neal and *Geo. M. Pardoe*, for appellant.

Geo. W. Wakefield, for appellee.

ADAMS, J.—I. The notice of the expiration of the time for redemption was given only by publication. It is insisted that the notice is insufficient for the reason that the plaintiff, Helen E. Sloan, and her husband, J. B. Sloan, were at the time of the giving of the notice in possession. The tax sale in question took place on the eighth day of January, 1877. The evidence relied upon as showing that the plaintiff and her husband were in possession at such time that they became entitled to notice, is the testimony of the husband, and is in these words: "I plowed a little on there in the fall of 1879, out of curiosity, to see how the land would plow. I plowed two furrows. I drove down and back on one end." The witness does not appear to have had any ownership of the land, nor instructions from the owner to enter upon it for any purpose. So far as the case is concerned, he must be regarded as a stranger to the land. Such a person, plowing two furrows without authority, and with no view to cultivation or any other useful purpose, could hardly be deemed to be in possession of the land at any time, and certainly not longer than he was actually upon it. In our opinion, then, neither the plaintiff nor her husband was entitled to notice, and if due notice was served upon the person in whose name the land was taxed, and notice was filed, with due proof of service, it appears to us that that was sufficient.

II. The plaintiffs insist, however, that even such notice was

not given, and if it was, that there is no proper evidence of it. We have, then, to consider the published notice, and the affidavit of publication. It is conceded that the land was taxed in the name of Jeff. C. Cleveland. The notice published is in the following words:

"To J. C. Cleveland and Unknown Owners: You are hereby notified that on the eighth day of January, 1877, the following described piece of real estate, situated in the county of Woodbury and state of Iowa: the southeast quarter of section five, township 89, range 47,—was sold at tax sale by the treasurer of said county to Geo. W. Wakefield, and was assigned and transferred by him to Thos. J. Stone, who is now the lawful holder of the certificate of purchase thereof; that the right of redemption will expire and a deed for said land be made, unless redemption from such sale be made within ninety days from the completed service of this notice.

"Dated this second day of January, 1880.

[Signed]

"THOS. J. STONE."

The first objection urged to the sufficiency of this notice is that in running to J. C. Cleveland it cannot be deemed to run to Jeff. C. Cleveland. In all legal papers it is doubtless better that the given name of a person, as well as the patronymic or surname, should, if single, be written in full, and if not single, that one given name should be written in full. But the practice of writing only the initial letters of given names instead of the names has become so common, that we should not, we think, be justified in holding that the practice is not allowable. *Ferguson v. Smith*, 10 Kan., 396.

Another objection urged is that the description of the land is insufficient, in that the township and range are not sufficiently described. But the court would be justified in taking judicial notice that there is in Woodbury county only one township of the given description. In our opinion the description is sufficient.

2. — : — :
use of initials
for given
name.

3. — : — :
description of
land: judicial
notice of
township and
range.

We come next to consider the sufficiency of the affidavit of publication. A copy of the affidavit is set out in the abstract, and is shown to be in these words:

"State of Iowa, Woodbury County: I, Thomas J. Stone, being first duly sworn, say—I am the lawful holder of the certificate of purchase described in the foregoing notice; that I served the same on the said J. C. Cleveland, and unknown owners of the land therein described, by causing said notice to be published three times in the *Sioux City Weekly Journal*, a newspaper printed and published at Sioux City, in the county of Woodbury in the state of Iowa, and issued weekly; the first publication thereof being the twenty-ninth day of January, 1880.

[Signed]

"THOS. J. STONE.

"Subscribed in my presence and sworn to before me this tenth day of March, 1880.

"C. B. STEADMAN,

[Seal.]

"Notary Public."

It is contended by the plaintiff that the affidavit does not show when the notice was published. It is not denied that 4. —: —: it shows the date of the first publication. It is affidavit of expressly stated that that was on the twenty-ninth publication: day of January. Two others must have been made sufficiency: time of publication. day of January. Two others must have been made between that time and the tenth day of March following, for the affidavit was made upon that day, and shows that there were three publications. The statute requires only three publications, and, so far as the time is concerned, it is sufficient if the first was made after the lapse of two years and nine months from the time of sale, and the service was completed ninety days before the execution of the deed. The plaintiff relies upon *Ellsworth v. Cordrey*, 63 Iowa, 675, (S. C. ante, p. 303;) but in that case it does not appear that the affidavit showed when the publication commenced.

Another objection urged is that the affidavit does not show that Cleveland, at the time of the publication, was a non-

5. —: —: resident of Woodbury county. As to this we
 —: resi- have to say that the statute does not require that
 —: dence of per- the affidavit shall show the facts necessary to
 —: son notified. justify service by publication. The provision is that it must
 show the service and the mode thereof. If the facts were
 such that the mode of service was not justifiable, the deed
 can be impeached. But it is made presumptive evidence of
 its own validity, so far as the point in question is concerned,
 and the party assailing the deed has the burden of showing
 the impeaching facts.

Another objection urged is that the jurat does not show
 that the person sworn was the certificate-holder, Stone, the
 6. —: —: person who subscribed the affidavit. It is true
 —: sum- that Stone's name does not appear in the jurat.
 —: ciency of —: jurat. But the affidavit purports to be made by Stone.
 His name is not only subscribed to it, but is written in the
 body, and he states that he was sworn. The jurat written
 underneath is to be construed with what precedes, and the
 whole, when taken together, we think, shows that Stone was
 the person sworn. We do not say that in a criminal action
 against a person for swearing falsely the affidavit and jurat
 would alone be sufficient to show that the alleged oath was
 taken. Possibly they would not. Indeed, in such action it
 may be that the affidavit and jurat, whatever their form might
 be, would be insufficient to prove that the alleged oath was
 taken. It was held in *Case v. People*, 76 N. Y., 242, that the
 taking of the oath must be proved independently of the jurat.
 But the present action is a civil one. It is not denied, as we
 understand, that the affidavit and jurat would be presumptive
 evidence of what they purport to show, if the jurat expressly
 stated that the affidavit was subscribed and sworn to by
 Thomas J. Stone. The question to be determined is whether
 the jurat, notwithstanding Stone's name is not expressly in
 it, really shows the same thing. It shows that the affidavit
 is subscribed and sworn to. Now, the affidavit purports to
 be Stone's, and no one's else. A writing is not *subscribed*,

unless it is signed by the person whose obligation or other paper it purports to be. If some other person than Stone, and without any authority from him, had signed Stone's name, the affidavit could not properly be said to be subscribed at all. The jurat, then, must be taken to mean that the affidavit was subscribed by Thomas J. Stone. Now, the affidavit shown to be subscribed by Stone purports to be his statement made by him in the first person, and under oath. Such an affidavit could not, we think, in any proper sense, be said to be sworn to by a person other than Stone. We have to say, then, that we do not think that the objection is well taken.

We come now to another objection urged by the plaintiff, and that is that while the affidavit purports to be made in

Woodbury county, the notary, Steadman, does not subscribe his name as a notary public of that county. It may be conceded that Steadman could not perform an act as notary public except

7. NOTARY
public: judicial
notice of
jurisdiction:
official signature.

in the county for which he was appointed; and that a court, in order to receive the affidavit as evidence, unaided by extrinsic evidence, would be obliged to take judicial notice, not only of the fact that Steadman is a notary public, but a notary public for Woodbury county, Iowa. It is to be observed that his seal was attached to the jurat. What precisely his seal was, is not shown; but we may assume, in support of the ruling below, that it was the proper seal as prescribed by statute for a notary public of Iowa. It is well settled that courts take notice of these seals of notaries public. *Yeaton v. Fry*, 5 Cranch, 535; *Chanoine v. Fowler*, 3 Wend., 173; *Porter v. Judson*, 1 Gray, 175. Steadman's seal, if it was what we may assume it was, purported to show that he was a notary public of Iowa, and we may, we think, take notice that he was such in fact. Can we go further, and take notice that he was a notary public for Woodbury county? It appears to us that we can. His appointment for a particular county was necessarily involved in the appointment itself.

The same public record which shows his appointment must show for what county he was appointed.

It is probably true that we would not take notice of any act of Steadman's that did not purport to be done by him in his official capacity. Now, the objection urged, as we understand, is that the act in question does not properly purport to be an official act; for, while Steadman subscribed himself as notary public, his true office, if he was competent to administer the oath, as claimed, was that of notary public for Woodbury county. So it is said that he did not, in a proper sense, attach his official designation. But to hold the doctrine contended for would be to make a very technical ruling, and we are unwilling to go that far, and especially as the effect might be to upset a great many and very important interests. In saying this, we do not forget that this court held, in *Willard v. Cramer*, 36 Iowa, 22, that a notary's certificate of *acknowledgment* was insufficient where the county for which the notary was appointed was not appended in connection with the words "notary public;" the ruling being that the name of the county was part of his official style or title. The ruling was based upon section 2227 of the Revision, identical with section 1958 of the Code. That section provides that the certificate shall show the title of the person before whom the acknowledgment is taken. It may be conceded that a notary's full title is not expressed by the words "notary public." The statute, the court thought, called for an expression of the full title. But there is no such provision of statute in reference to a jurat. We think that the inference is that it was not deemed necessary. It appears to us, therefore, that the plaintiff's objection cannot be sustained.

Having discovered no error, the judgment must be

AFFIRMED.

THOMASSEN, GUARDIAN, v. VAN WYNGAARDEN ET AL.

1. **Promissory Note: INDORSEMENT: PRESUMPTION OF HOLDER'S CONSENT.** Where an indorsement was made on a note while it was in the hands of the payee, the presumption must be indulged, in the absence of strong and convincing evidence to the contrary, that the indorsement was made with the knowledge and consent of the payee, upon the receipt of the money named in the indorsement.
2. **Trust: PAYMENT TO TRUSTEE: BENEFICIARIES BOUND BY: FORM OF SIGNATURE TO RECEIPT.** Where it fairly appears, from a receipt signed with the proper name only of one who was a trustee, that the money receipted for was received by her in her capacity as trustee, and not to her own use, and she had the legal right as trustee to receive and receipt for the money, *held* that the receipt was binding on the beneficiaries.
3. ———: **PAYMENT OF INTEREST TO TRUSTEE: RECEIPT FOR.** One who holds in trust for others the legal title to a note and mortgage may receive and receipt for interest thereon before or after it is due, and a receipt given for a certain sum in full for interest to a named date will bind the beneficiaries.
4. **Dry Trust: WHAT IS NOT: PAYMENT TO TRUSTEE DISCHARGES DEBTOR.** Where the legal title to a note and mortgage is vested in one for the benefit of others, and it is made his duty to collect the interest and principal when they fall due, and to guard the interests of the beneficiaries, the trust is not a mere dry one, so called, and payments made upon the note and mortgage in good faith to the trustee will discharge the debt *pro tanto*, and be binding on the beneficiaries.

Appeal from Marion Circuit Court.

WEDNESDAY, APRIL 8.

ACTION in equity to foreclose two mortgages. From the decree the plaintiff appeals.

Bosquet & Earle, for appellants.

Gesman & Prouty and *J. M. St. John*, for appellee.

SEEVERS, J.—The defendant, Wyngaarden, executed the following promissory note:

"\$1,400.

PELLA, IOWA, November 11, 1878.

"Six years after date, for value received, I promise to pay

to Jantie Van Wyngaarden, in trust for Gertruda Geradina Thomassen, Jana Thomassen, Wilhemina Thomassen, Johannes Thomassen and Jan Thomassen, heirs of Maarke Thomassen, deceased, or order, the sum of fourteen hundred dollars, payable at the First National Bank, Pella, Iowa, with interest, payable annually, at the rate of six per cent per annum from date until paid. Interest when due to become principal and draw ten per cent, and an attorney-fee of ten per cent if suit is commenced on this note."

The mortgages were given to Jantie Van Wyngaarden in trust for the beneficiaries named in the note, and it is provided in the mortgages that the mortgagor "shall pay or cause to be paid to the said Jantie Van Wyngaarden, in trust for the above-named parties, her executors and administrators, or assigns, the sum of \$1,400, with interest thereon from date, according to the tenor and effect of the promissory note above stated;" then the mortgage was to be void.

In March, 1881, Jantie Van Wyngaarden died, and in June following a portion of the land described in the mortgage was conveyed to J. S. Polk, one of the defendants, and who bound himself to pay the amount of the mortgage, with interest from January 1, 1882. It was pleaded as a defense that the interest up to that time had been paid. The mortgages provided that, in the event the interest was not paid as therein provided, then the whole debt became due. The beneficiaries are grandchildren of Jantie Van Wyngaarden, and are minors, and the plaintiff is their guardian. This suit was commenced in March, 1882, and the court found that there was nothing due at that time, but, as certain interest became due pending the litigation, which the defendant Polk had offered to pay, the court in the decree made suitable provisions in relation thereto, and retained the case on the docket, to the end, if said Polk should fail to pay the interest or principal as it should become due, that the mortgages could be foreclosed.

I. Counsel for the appellant insist that there is no suf-

Thomassen, Guardian, v. Van Wyngaarden et al.

ficient evidence showing that the interest due on the note up to January, 1882, has been paid. It is stated in the petition that the note and mortgages were delivered to the trustee therein named at the time they were executed. As nothing appears to the contrary, the presumption will be indulged that they remained in her possession until her death. The note was introduced in evidence by the plaintiff, and indorsed thereon is the following: "Nov. 11, 1879. Received on the within \$84, as interest for the year 1878-1879, or the current year." The trustee died about four months after the indorsement purports to be made, and, as the note was in her possession during that time, the presumption must be indulged that the indorsement was made with her knowledge and consent, and that she received the amount of money therein stated. There is evidence showing that the indorsement is not in the handwriting of the trustee, and one of the beneficiaries named in the note testifies that no money was paid her by the trustee. This evidence is insufficient to warrant us in disregarding the indorsement on the note. In the absence of fraud, or strong and convincing evidence, the conclusive presumption must be indulged that the indorsement on the note was made with the knowledge and consent of the trustee.

The defendants introduced in evidence a receipt in the following words, and proved that it was executed by the trustee:

1. PROMIS-
SORY NOTE:
indorsement:
presumption
of holder's
consent.

"PELLA, IOWA, December 22, 1880.

"Received of Jan Van Wyngaarden the sum of one hundred and forty-seven dollars, as interest on a certain note, secured by mortgage, to me given by the said Jan Van Wyngaarden in trust, (for the beneficiaries above named;) this being in full up to January 1, 1882.

"JANTIE VAN WYNGAARDEN."

Counsel for the plaintiff insist that the receipt is signed by the trustee as an individual, and therefore the beneficiaries are not bound thereby. But we think it fairly appears from

the receipt itself that the money was received by the trustee as such. It was paid to and received by the person to whom it was payable by the terms of the note, and she will be charged as having received it in her capacity as trustee.

It is further insisted that at the time the receipt purports to have been executed but one year's interest, or \$84, was due, and that the trustee was not authorized to receive the interest not due, and that the beneficiaries are not bound by said receipt to any greater extent than the interest then due. For the reasons hereafter stated, we do not think this position is tenable.

Counsel further insist that the amount received, \$147, was less than the amount of interest due up to January, 1882, and therefore the court erred in finding that the interest up to that time had been paid. It however is expressly stated in the receipt that the amount then paid was in full of such interest, and it is immaterial whether such amount was then paid or had been received at some prior time. In the absence of fraud or collusion, for the reasons hereafter stated, we think the trustee, as the legal owner of the note, could receive the interest due or to become due at such times and in such amounts as she saw proper; subject, however, to be held accountable at the instance of the beneficiaries for the faithful performance of the trust.

II. Counsel for the appellant insist that the trust created by the execution of the notes and mortgages is a simple or dry trust, and that the trustee in such a trust does not have the power to manage and dispose of the trust estate, and therefore the beneficiaries are not bound by what the trustee did. A simple or dry trust is defined to be one "where property is vested in one person in trust for another, and the nature of the trust, not being prescribed by the donor, is left to the construction of the law." Perry, Trusts, § 520. "There can be but few of these dry trusts; for, when there is no control, and no duty to be performed by the trustee, it becomes a

3. — : pay:
ment of inter-
est to trustee:
receipt for.

4. DRY trust
what is not:
payment to
trustee dis-
charges
debtor.

simple use, which the statute of uses executes in the *cestui que trust*, and he thus unites both the legal and beneficial estate in himself."

The trust under consideration is materially different; for it is so far declared as to cast on the trustee a duty for the performance of which she will be held accountable. It is made the duty of the trustee to receive and collect the interest and the principal when it becomes due. The legal title to the note and mortgages is vested in the trustee. It is her duty to preserve and protect the interest of the beneficiaries. But, in the absence of fraud or collusion, the trustee could satisfy the mortgages and acknowledge satisfaction of the debt, which would be binding on the beneficiaries. It is said that any one dealing with the trustee must see that money paid in the discharge of the trust was properly appropriated; but we do not think this is so, for the simple reason that the trustee was the legal owner of the note, and authorized to receive payment of both the principal and interest. An administrator in one sense is a trustee for the estate he represents; and yet he is the legal owner of the notes and mortgages belonging thereto. A person making him a payment is not bound to see that the money is properly accounted for.

The rule, it seems to us, should be the same in the case under consideration. The decree of the circuit court must be

AFFIRMED.

65	609
91	404

65	602
105	552

THE BANK OF MONROE V. THE ANDERSON BROS. MINING &
RAILWAY CO. ET AL

1. **Instructions: MUST BE SUPPORTED BY EVIDENCE.** An instruction in this case *held* to be erroneous, because thereby the court submitted to the jury for their determination a question of fact material to the case, on which there was no evidence.
2. **Principal and Surety: DUTY OF CREDITOR TO INFORM SURETY OF FACTS RELATING TO THE RISK.** If a surety, before becoming such, applies to the creditor for information relating to the risk about to be assumed, the creditor, if he answers at all, must disclose all the facts which he knows material to the inquiry; and he can do nothing to deceive or mislead the surety without vitiating the agreement. Whether the creditor is bound, on his own motion, to disclose to one about to become a surety facts within his knowledge increasing the risk, depends on the circumstances of the case. If there is nothing in the circumstances to indicate that the surety is being misled or deceived, or is ignorant of facts materially affecting the risk, the creditor is not bound to seek him out and inform him of the facts; but if he knows, or has good grounds for believing, that the surety is being deceived or misled, or has entered into the contract in ignorance of facts materially increasing the risk, and he knows of such facts, and has an opportunity to disclose them to the surety before accepting the obligation, he must do so, or, for his want of fair dealing in this respect, the surety may afterwards avoid the contract. See opinion for authorities collated by REED, J.
3. —: **FRAUD ON SURETY: AVOIDANCE OF BY PAYEE OF NOTE: BURDEN OF PROOF.** Where the signature of a surety to a promissory note is obtained by the fraud of the principal, the burden of proof is upon the payee of the note, before he can recover, to show that he took it without knowledge of the fraud. Compare *Lane v. Krekle*, 22 Iowa, 399, and *Union National Bank v. Barber*, 56 Id., 559.

Appeal from Jasper Circuit Court.

WEDNESDAY, APRIL 8.

ACTION on a promissory note executed by defendants to one Tunis Schenck, and by him assigned to plaintiff. The Anderson Brothers Mining & Railway Company made no defense. Defendant Gifford answered, admitting the execution of the note, but alleging that he signed it only as a surety, and that his signature thereto was obtained by fraud, and that the con-

The Bank of Monroe v. The Anderson Bros. Mining and Railway Co.

tract was void for that reason. He alleges that at the time the note was executed Schenck, the payee named therein, was president of the bank of Monroe, and one R. C. Anderson was cashier of said bank; that said Anderson was also a stockholder and manager of the Anderson Brothers Mining & Railway Company; and that, while acting as such cashier, he had taken and appropriated a very large sum of money belonging to said bank, either to his own use or the use of said mining and railway company, in which transaction he was guilty of the crime of embezzlement; that both he and the mining and railway company were insolvent; that these facts were known to the bank and its officers, and that said officers thereupon threatened to criminally prosecute Anderson for said embezzlement, if the money so taken was not in some manner secured or returned to the bank; that thereupon the bank and Schenck and Anderson and the mining and railway company conspired together to cheat and defraud defendant; the bank and Schenck agreeing, for the purpose of bolstering said Anderson up, and giving him a false and fictitious standing and credit, to conceal said defalcation, and the insolvency of Anderson and the mining and railway company, and to nominally retain Anderson as cashier of the bank, and to conceal the fact of his indebtedness and that of the mining and railway company to the bank, and the fact of the existence of certain mortgages given by Anderson on his property to secure a portion of the indebtedness, and the purpose for which the money which he desired to borrow was wanted; and that Anderson agreed also to conceal these facts, and that he would procure the signature of defendant Gifford, and other responsible parties, to promissory notes, and turn the same over to the bank in payment of said indebtedness; and that there was an agreement between the parties that if Anderson procured such notes and turned them over to the bank he should not be prosecuted for said embezzlement; and that, in pursuance of this agreement, the bank and its officers did conceal the facts of said embezzlement, and the

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indebtedness and the insolvency of said parties, and the existence of said mortgages, and did nominally retain Anderson as their cashier, and thereby gave him a false and fictitious character and standing; and that Anderson thereupon applied to defendant to sign the note sued on as surety, and, to induce him to sign it, represented that he desired to borrow \$2,500 from plaintiff, to be used in starting up his coal mine at Knoxville Junction; that said mine was ready to commence business, and that he wanted the money to use in that business; also that he was practically out of debt, and his property was unincumbered, and that he had \$7,000 of stock in the plaintiff bank, and that he was solvent; and that the Anderson Brothers Mining & Railway company, the principal maker of said note, was a copartnership, consisting of himself and his brother, J. Q. Anderson; that these representations were all false, and were known by Anderson to be false when he made them, and were made by him with intent to defraud and cheat defendant; and that defendant relied upon said representations and believed them to be true, and was induced thereby to sign said note as surety; and that plaintiff and its officers well knew the means by which his signature to said note had been obtained when they accepted the same. There was a verdict and judgment for defendant, and plaintiff appeals.

Winslow & Varnum and *J. Kipp & Son*, for appellant

J. F. Lacey and *A. Clark*, for appellees.

REED, J.—The evidence given on the trial shows that R. C. Anderson was cashier of the plaintiff bank from its organization in 1877 to the 27th of January, 1883. He was also a stockholder and the business manager of the Anderson Brothers Mining & Railway Company, a corporation which was engaged in developing a coal mine. He was also a member of the copartnership of Anderson Brothers, which consisted of himself and his brother, J. Q. Anderson. During the year 1881, he and the copartnership of Anderson Brothers became

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indebted to the bank to the amount of more than \$14,000 for money advanced. More than one half of this indebtedness was contracted without the knowledge of the directors of the bank. When the members of the directory learned of the indebtedness, a meeting of the directors was held, at which it was agreed that an additional loan of \$5,000 should be made to him, and that he should secure the whole amount of the indebtedness by a pledge of stock which he held in the bank, of the value of over \$7,000, and a mortgage on real estate, and this agreement was carried out. This transaction occurred in September, 1881. The money obtained by these advances was used in the business of the copartnership, and in developing the coal mine which belonged to the corporation; but the credit therefor seems to have been extended to Anderson personally, and to the firm. During the year 1882, various advances of money were made by the bank to the mining corporation, and on the 19th of February, 1883, the corporation was indebted to the bank in the sum of \$13,784. On the 22d of February and the 2d of March, the account of the corporation was credited with the full amount of this indebtedness. Seven thousand five hundred dollars of this credit was for the note in suit, (which is for \$2,500,) and two other notes for the same amount, each signed by the corporation and other parties. The balance of the credit was for four promissory notes of the mining corporation, three of which were secured by a real estate mortgage given by Anderson, and the fourth by a mortgage on the mining property of the corporation.

About the first day of February, an agreement was entered into between Schenck, who was the president of the bank, and Anderson, that the bank would accept the promissory notes of any responsible parties which Anderson might obtain and turn over to it, and would give credit for the amount thereof on the indebtedness of the corporation; and, in pursuance of this agreement, Anderson prepared the three notes for \$2,500 each, and signed the name of the mining

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corporation to them, and procured defendant Gifford to sign the one in suit as surety, and other parties to sign the others in the same way, and delivered the same to Schenck, who indorsed them without recourse, and delivered them to the bank, and the amount thereof was credited on the account of the corporation.

There was evidence which would warrant the jury in finding that Anderson represented to defendant, for the purpose of inducing him to sign the note, that he had made an arrangement with Schenck to borrow \$2,500 from him, to be used in starting the business of his coal mine, and that he needed that amount for that purpose, and would appropriate it to that use. Also that he represented that his property was unincumbered, and that he was still a stockholder in the bank. The debt contracted by Anderson and the copartnership in 1881 was still unpaid, and defendant had no knowledge of its existence, or of the indebtedness of the mining corporation to the bank. Defendant knew when he signed it that the note was signed by the Anderson Brothers Mining & Railway Company, but the evidence would justify the jury in finding that he then believed that this was the name of the copartnership composed of Anderson and his brother, and that he supposed that Anderson was personally liable on the note, and that Anderson knew that defendant was acting in that belief when he signed the note, but made no disclosures to him as to the real facts of the case. But defendant made no direct inquiry of him with reference to the matter, nor did Anderson directly state to him that he was personally responsible on the note, or that it was signed by said copartnership. The articles of incorporation of said company provided that the stockholders should not be liable for the corporate debts. Both Anderson and the corporation were insolvent when the note was given. •

I. The court gave the following instruction to the jury: "If you find from the preponderance of the testimony that

the signature of the defendant Gifford was procured by means of the false and fraudulent statements of R. C. Anderson, and that he perpetrated such fraud pursuant to a previous agreement therefor between himself and the officers or agents of the plaintiff; or if, before taking the note from Schenck, they had knowledge of the fraud by which Anderson had procured Gifford's name to the note,—it is void in the plaintiff's hands, and your verdict must be for defendant. Mere suspicion or knowledge of facts which would have put an ordinarily prudent man on inquiry as to means by which the note was procured is not sufficient, and is not equivalent to notice of the fraud."

Plaintiff assigns as error the giving of this instruction. The correctness of the instruction as an abstract proposition is not denied; but the objection urged against it is that it is not based on any evidence given in the case. The instruction submits three questions to the jury for their determination, viz.: (1) Whether defendant was induced to sign the note by the false statements of Anderson; (2) whether Anderson perpetrated such fraud pursuant to a previous agreement therefor between himself and the officers or agents of the bank; and (3) whether the officers or agents of the bank knew of such fraud before they took the note from Schenck; and it tells them that if from the evidence they can answer the first question, and either of the others, in the affirmative, their verdict must be for defendant. As stated above, there was evidence which would warrant the jury in finding that defendant was induced to sign the note by the false and fraudulent representations of Anderson as to the purpose for which he desired to use the note, and as to the condition of his property and his own financial standing. But there is no evidence which tends in any degree to prove either that there was a previous agreement between Anderson and any officer or agent of the bank that these representations should be made, or that any person should be induced to sign the note by means of them, or that they knew when they accepted

The Bank of Monroe v. The Anderson Bros. Mining and Railway Co.

the note that defendant had been induced to sign it by any such means. This court has often held that it is error to submit a question of fact which is material to the case, upon which there is no evidence, to the jury for their determination. See *State v. Osborne*, 45 Iowa, 425; *York v. Wallace*, 48 Iowa, 305; *Templin v. Rothweiler*, 56 Iowa, 259.

II. Defendant did not apply to Schenck, or any other officer or agent of the bank, for information as to the purpose for

which the note was being given, or as to the state
THE SAME. of Anderson's account with the bank. Nor did they communicate any information on these subjects to him before accepting the note. The court gave the following instruction as to the duty of the bank to give him information as to the circumstances of the principal debtor before accepting him as surety for the debt:

“But whether Anderson perpetrated a fraud in procuring the note or not, if you find from a preponderance of the testimony that he had been the plaintiff's cashier, and while such cashier had fraudulently converted funds of the plaintiff to his own use, or that of the defendant corporation in which he was a stockholder, and for which he was general manager, and the officers or agents had knowledge thereof, if they had an opportunity so to do prior to accepting the note signed by the defendant Gifford in part payment or security for such deficit to the bank, it was their duty to notify him of such fraudulent conversion by Anderson, and if, upon having such opportunity, they failed in the performance of such duty, it vitiates the note. Yet, although Anderson or the defendant corporation had become largely indebted to the plaintiff, and both were insolvent on account of loss of investment in a coal mine, if such indebtedness was for loans or overdrafts in the usual course of business in plaintiff's corporation, or by the consent of its officers or agents other than Anderson, not involving fraud or criminality on his part, the plaintiff was under no obligation to notify the defendant Gifford of such

indebtedness or insolvency until he called on it for information."

We are of the opinion that there was no evidence in the case which justified the giving of this instruction. The doctrine of the instruction is that plaintiff was not bound to voluntarily notify defendant of the indebtedness and insolvency of Anderson and the mining corporation, unless the debt was created by the fraudulent or criminal appropriation by Anderson of the funds of the bank to his own use, or that of the corporation; but that if the indebtedness did arise out of such appropriation, and the officers of the bank had an opportunity, before accepting defendant as surety for the debt, to inform him of that fact, and neglected to do so, such neglect would vitiate the contract. A portion of the debt created in 1881 was contracted without the knowledge of the directors of the bank, it is true. But there is not the slightest evidence that it was contracted with a fraudulent or criminal intent by Anderson. He was solvent at that time, and was able to and did secure that indebtedness, and \$5,000 in addition to that, to the entire satisfaction of the directors. The debt for which defendants' note was taken as security was the debt of the mining corporation, and was not contracted until December, 1882. There is no evidence showing the circumstances under which the credit was extended to the corporation. It is not shown that the advances were not made with the knowledge and consent of the directors of the bank. Nor is it shown that the circumstances of the corporation were such at the time that it was even imprudent to loan it that amount of money. There is no showing as to the amount or value of the property owned by it at the time, or as to the amount of business done by it, or of its business prospect. To submit to the jury, as the instruction does, the question whether the debt arose out of a fraudulent or criminal misappropriation by Anderson of the funds of the bank, was but to invite them to enter the field of speculation and conjecture.

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Having reached the conclusion that the evidence affords no warrant for the instruction in the form in which it was given, it would not ordinarily be thought necessary to consider the question of its soundness as an abstract proposition. But, in view of the probability of a retrial of the case, and of the importance of the question involved in its bearing upon the case, we have thought it proper to lay down what we conceive to be the true rule as to the duty of a creditor, who is about to accept personal security for a debt due him, to inform the surety of facts within his knowledge which would have the effect to increase the risks of the undertaking of the surety. The contract of suretyship, as a general rule, is for the benefit of the creditor, while the surety derives no advantage from it. Hence the law imposes upon the creditor the duty of dealing with the surety at every step of the transaction with the utmost good faith. If the surety applies to him, before entering into the contract, for information touching any matter materially affecting the risk of the undertaking, he is bound, if he assumes to answer the inquiry at all, to give full information as to every fact within his knowledge; and he can do nothing to deceive or mislead the surety without vitiating the agreement. And whether he is bound, before accepting the undertaking of the surety, and without being applied to by him for information on the subject, to inform him of facts within his knowledge which increase the risks of the undertaking, depends on the circumstances of the case. If there is nothing in the circumstances to indicate that the surety is being misled or deceived, or that he is entering into the contract in ignorance of facts materially affecting its risks, the creditor is not bound to seek him out, or, without being applied to, communicate to him information as to the facts within his knowledge. But in such case he may assume that the surety has obtained information for his guidance from other sources, or that he has chosen to assume the risks of the undertaking, whatever they may be.

2. PRINCIPAL
and surety;
duty of cred-
itor to inform
surety of
facts relating
to the risk.

But if he knows, or has good grounds for believing, that the surety is being deceived or misled, or that he was induced to enter into the contract in ignorance of facts materially increasing the risks, of which he has knowledge, and he has an opportunity, before accepting his undertaking, to inform him of such facts, good faith and fair dealing demand that he should make such disclosure to him; and if he accepts the contract without doing so, the surety may afterwards avoid it. This view of the duty of the creditor is supported by the following authorities: *Pidcock v. Bishop*, 3 Barn. & C., 605; *Owen v. Homan*, 4 H. L. Cas., 997; *Railton v. Mathews*, 10 Clark & F., 934; *Hamilton v. Watson*, 12 Clark & F., 109; *Franklin Bank v. Cooper*, 39 Me., 542; *Same v. Stevens*, Id., 532; *Graves v. Lebanon Bank*, 10 Bush, (Ky.) 23; *Stone v. Compton*, 5 Bing., (N. C.), 142; *Booth v. Storrs*, 75 Ill., 438; *Ham v. Greve*, 34 Ind., 18.

III. The court, in another instruction, told the jury that if Anderson perpetrated a fraud upon defendant, and thereby procured his signature to the note, the burden of proof would be on plaintiff to show, before it could recover on the note, that it took it without knowledge of the fraud. Plaintiff assigns the giving of this instruction as error. The position of counsel is that the fraud of the principal debtor in procuring the signature of the surety to the note does not constitute a defense against the note in the hands of the creditor. This is certainly true if the creditor accepted the note in payment of the debt, or gave an extension of time for its payment on its strength, without knowledge of the fraud. But if plaintiff knew, when it accepted it, that defendant's signature to the note had been obtained by fraud, it is as certainly true that the defense is available to the surety. The burden of proof is thrown on the indorsee, who seeks to enforce payment of a note which is tainted with fraud in its inception, to show that he is a *bona fide* holder. *Lane v. Krekle*, 22 Iowa, 399; *Union National Bank v. Barber*, 56 Id., 559. And there

3. —: fraud
on surety:
avoidance of
by payee of
note: burden
of proof.

Carey v. Gunnison et al.

is no reason why a more favorable rule than this should prevail in favor of the creditor who seeks to enforce payment against the surety whose signature to the contract was obtained by the fraud of the principal debtor. Other questions are presented by the record and were argued by counsel. but, as they will probably not arise on the retrial of the cause, we deem it unnecessary to consider them.

REVERSED.

65	702
80	412
65	702
88	456
65	702
89	690
65	702
100	474
65	702
105	256

CAREY V. GUNNISON ET AL.

1. **Contract: ACTION ON: DEFENSE—MISTAKE AS TO SUBJECT-MATTER: NOT AN EQUITABLE ISSUE.** Where the action was for damages upon an alleged written contract, and the defendant, without asking for any affirmative relief, simply alleged facts showing that there was a mutual mistake as to the subject-matter of the contract, *held* that the legal effect of the answer was that the minds of the parties never came together, and that, hence, there was no contract, and that the issue so raised was not an equitable one, and was properly submitted to a jury as in an ordinary action. Had defendant gone farther, and asked for a cancellation of the alleged contract, he would have invoked the equity powers of the court.
2. ———: ———: ———: **INSTRUCTION: MISTAKE AS TO ISSUE.** In such case, the only issue raised by the answer was as to the existence of the alleged contract, and an instruction which directed the jury to determine from the evidence what the contract was, was erroneous, not only because there was no issue of that kind, but because, even if there had been, it was virtually allowing the jury to reform the writing.
3. ———: **VOID FOR MUTUAL MISTAKE: TAKING POSSESSION OF GOODS UNDER: RIGHTS AND LIABILITIES.** Where, under such supposed contract, defendant took possession of the goods involved, he was not thereby necessarily estopped from setting up the want of a contract. If the contract was void, his possession would not give him title, and he would be accountable to the plaintiff for the goods.
4. ———: **VOID SALE OF BUSINESS: RECOVERY FOR DAMAGE TO GOOD WILL: EVIDENCE.** Where defendant took possession of a stock of goods and the business relating thereto, under a supposed contract of purchase from plaintiff, which defendant, in an action thereon against him for a part of the purchase price, alleged to be void, which action was aided by an attachment of the goods, *held* that, since, on defendant's theory,

 Carey v. Gunnison et al.

he never in fact purchased the stock and business, he was not entitled to recover in a cross action for any loss of good will occasioned by the attachment, and evidence of the value thereof was improperly admitted.

Appeal from Fremont District Court.

WEDNESDAY, APRIL 8.

THIS action was brought to recover for damages alleged to have been sustained by reason of a breach of a contract entered into between the plaintiff and the defendant, whereby the latter purchased of the former his interest in a stock of goods. There was a trial to a jury, and verdict and judgment were rendered for the defendant. The plaintiff appeals.

Draper & Thorne and *James McCabe*, for appellant.

W. W. Morsman, for appellees.

ADAMS, J.—I. The plaintiff, as a member of the firm of Carey & Warren, was at one time in trade as a hardware merchant in Shenandoah, Iowa. In 1877 he sold, as he supposed, his interest in the stock to the defendant, Gunnison, who became a partner with Warren. The plaintiff agreed to pay of the indebtedness of Carey & Warren the sum of \$10,000, and Warren & Gunnison agreed to pay the remainder. The agreement was reduced to writing. The plaintiff has paid indebtedness in excess of \$10,000, and which he avers Gunnison should have paid, but failed to pay. This action is brought to recover for such payments.

The defendant, while admitting the execution of the agreement declared on, averred in his answer that he was induced to enter into it by the fraud of the plaintiff, and also that the agreement was entered into by mutual mistake. He averred that it was represented by the plaintiff that the aggregate liabilities of Carey & Warren would not exceed \$15,000, and that it was believed and understood that the defendant Gun-

1. CONTRACT:
action on: de-
fense—mis-
take as to
subject-mat-
ter: not an
equitable
issue.

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nison's liability would not exceed \$5,000, which amount he has paid, but that the liabilities of Carey & Warren amounted to \$19,000. He also averred that he had no knowledge of the amount of the liabilities of Carey & Warren, and relied upon Carey's representation, and entered into the written contract under the mistaken belief that the liabilities would not exceed \$15,000, and that, if the facts had been known, the contract would not have been made. Such being the defendant's answer, the plaintiff moved to transfer the issue in respect to the alleged mistake to the equity side of the docket for trial as an equitable issue. The court overruled the motion, and the plaintiff assigns the ruling as error.

The case is now before us upon rehearing. When it was first before us, it was assumed that the issue presented was an equitable issue, but the court thought that, nevertheless, as no affirmative relief was sought, it might be tried by a jury. Upon further consideration of the case we have come to think that this view cannot be sustained. It seems to us that the court improperly assumed that the issue is an equitable one. The defendant does not aver in his answer that there was an agreement that the liability which he assumed should be limited to \$5,000. If such had been the fact, it would appear that the mistake was made when the parties came to put their oral agreement in writing. But there is no pretense that there is any difference between the terms of the oral agreement and of the writing intended to express it. The mistake, then, if any, was in regard to the subject-matter of the contract. If the facts are as averred, the parties did not know what they were contracting about. They supposed that they knew, but they were mistaken. Where a material mutual mistake is made by parties in respect to the subject-matter of a contract, the result is that in contemplation of law there is no contract. The minds of the parties do not meet. If an action be brought on such contract, it is competent for the defendant to deny its existence, and in support of the denial he may allege and prove the mistake. In such case the deter-

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mination required is as to the existence of the contract, and that determination may be expressed in a simple judgment for or against the defendant, as the fact in regard to the alleged mistake shall appear to be. If the defendant shall not be satisfied to plead merely defensively, lest the plaintiff should withdraw his action and reserve his pretended contract for enforcement at what he might deem a more favorable time, it would be the defendant's right to set up the mistake by cross-action, and ask for cancellation. In such case he would invoke the equity powers of the court, because the relief prayed for could be granted only by a decree.

In case the party aggrieved by the mistake should not see fit to wait until he should be sued, it would be his right to bring an action for cancellation, and the issue then presented would be the same as in the case of the cross-action above supposed. If the mistake did not exist in the subject-matter so as to prevent the minds of the parties from meeting, but merely in the terms of the writing by which the parties undertook to express their valid oral agreement, then the writing, being conclusive in an action of law, would need to be reformed, or, what is substantially the same thing, the true agreement of the parties would need to be determined and expressed in a judicial decision. The determination and expression of the true agreement would call for the exercise of equity powers. But the determination of the existence or non-existence of a contract, where no cancellation is asked, may, we think, be made in a court of law, and in the exercise only of such powers as belong to a court sitting as a court of law. We do not say that this rule would apply in the case of a deed, where there had been such mistake in the subject-matter as to entitle the grantor to have the deed declared null. Possibly the force given to a deed is such that it would be deemed to have passed the legal title notwithstanding the mistake. If so, the party aggrieved would have only an equitable right, and while he might, of course, assert such right by answer in an action at law, yet, as his answer would set

up only an equitable right, it would be deemed an equitable answer, and the issue would, we think, be triable only to the court, and in the exercise of its equity powers. The action itself would become an equitable one so far as such issue would be concerned. There is no inconsistency between this view and sections 2740 and 2741 of the Code.

In support of our conclusion that the issue in question presented by the defendant's answer was not an equitable but legal issue, and that the motion, therefore, was properly overruled, we have allowed our discussion to take a somewhat wider range than might be thought strictly necessary; but we have felt constrained to do so, partly for the purpose of setting forth with greater clearness our position, and partly as preliminary to another question which we now proceed to consider.

II. The court, in its charge, after referring to the facts relied upon as a defense, gave an instruction in these words:

2. —: —: “If each of these facts is proved by the character of the evidence which I have told you is required, the contract is enforceable against the defendant only in the sense in which it was intended by the parties when they entered into it, and it would follow that, if the defendant has paid the full amount of said liabilities which it was understood by the parties when they entered into the contract that he should pay, the plaintiff can recover nothing. But if he has not paid the full amount of said liabilities which it was understood he should pay, the plaintiff will be entitled to recover the difference between the amount which defendant has paid on the liabilities and the amount which it was understood he should pay thereon.” The plaintiff assigns the giving of this instruction as error.

Instruction :
mistake as to
issue.

The view which this court took upon the former hearing, respecting the trial of an equitable issue by a jury, was such that this instruction was not specially considered in the opinion. The petition for a rehearing was directed mostly against the view as expressed, assuming that, if that view

should appear to be unsound, it would be held that the court below erred in its ruling upon the motion. As our re-examination has led us to change our view upon which we sustained the ruling, without reaching the conclusion that the ruling was wrong, we deem it necessary now to consider the instruction, and we have to say that it appears to us that it cannot be sustained. The instruction proceeds virtually upon the theory that there was a valid oral agreement which the written agreement failed to express, and that it was competent for the jury to find what that oral agreement was, and to enforce it as they should find it. This, it appears to us, was virtually allowing the jury to reform the writing, and we do not think that this would have been allowable, even if the answer had presented such an issue. But the answer does not show that there was a valid oral agreement. On the other hand, it negatives such idea by averring a material mistake in regard to the subject-matter of the contract, and we now sustain the ruling upon the motion, on the ground that the defense was, not that the writing failed to express the agreement as made, but that by reason of the mistake the minds of the parties did not meet.

We may say further that the evidence shows very clearly that there was no agreement, unless it was the same as that which the parties expressed in writing. The defendant was content with that agreement, and would be now, if the facts had been as he supposed they were. It has no defense, then, except upon the theory that the agreement is void. If it was so, he would not necessarily be concluded from setting

up its invalidity because he took possession of the stock. If he took possession under a void purchase his possession did not give him title, and he would be accountable for the goods to the plaintiff. Whether his action was such, after he discovered the mistake, as to operate as a waiver of it, or estop him from setting it up, we have no occasion to express an opinion. If his action was such, it would simply follow that

3. — —: void
for mutual
mistake:
taking pos-
session of
goods under:
rights and
liabilities.

the agreement to be enforced is that which the parties put in writing.

III. The plaintiff sued out an attachment and levied upon the stock. The defendant filed a counter-claim for damages. Among other grounds of damage he claimed that the good will of the business was impaired by the attachment. In proof of such damages he asked a witness a question in these words: "What, in your opinion, was the good will of the concern worth at the time of the levy of the attachment?" This question was objected to, but the objection was overruled, and the witness answered that the good will was worth \$1,000. The admission of this evidence is assigned as error. The question asked was broad enough to cover, and doubtless was intended to cover, any good will arising from the custom of the store established during the time that the plaintiff was in trade. But if the defendant never made a valid purchase of the plaintiff's interest in the stock, and took possession of it by mistake, and became accountable to the plaintiff for it, he was not entitled to recover for loss of good will upon the theory upon which we think that the question was asked and answered. We think, therefore, that the question was objectionable. Several other questions have been argued, but under the views which we have expressed it seems probable that very few, if any, of them will arise upon another trial.

4. ——— : void
sale of busi-
ness: recov-
ery for dam-
age to good
will : evi-
dence.

REVERSED.

THE CONTINENTAL LIFE INS. CO. V. PERRY & TOWNSEND.

1. **Tax Sale:** PURCHASE OF CERTIFICATE BY AGENTS OF LAND-OWNER: DEED TO AGENTS SET ASIDE. An agent who purchases a tax certificate upon the land of his principal holds it in trust for his principal, and he cannot be allowed to take and hold a tax deed as against his principal on account of the negligence of the principal in reimbursing him, unless he has made a full and fair statement to his principal of the account between them, and of the amount necessary to reimburse him. In this case, as the statement made by the agents was both deficient and misleading, and was not made to the principal at all, but to another agent, not shown to have any authority in the matter, *held* that the tax deed under which the agents claimed should be set aside at the suit of the principal.

Appeal from Jasper Circuit Court.

WEDNESDAY, APRIL 8.

ACTION in equity to to set aside a tax deed of certain land in Monroe county. The plaintiff's petition was dismissed, and judgment was rendered for the defendants for costs. The plaintiff appeals.

Henry L. Dashiell, for appellant.

Perry & Townsend, *pro se*.

ADAMS, J.—The plaintiff became the owner of the land in question through the foreclosure of a mortgage. The defendants, T. B. Perry and J. S. Townsend, doing business under the firm name of Perry & Townsend, acted as attorneys for the plaintiff in the foreclosure. For their services in such foreclosure they were paid in full. This appears to have been in 1878. In October of the year previous it appears that the premises had been sold for taxes, the sale being the one now in question. Whether the defendants, as faithful attorneys, should have discovered this fact, and notified the plaintiff before foreclosure, in order that it might redeem, we need

not determine. The case will turn upon other considerations. They did not, it appears, in fact discover the sale until October, 1880. In December of that year the defendant, Townsend, purchased the tax certificate, paying therefor a little less than \$180. At the time of this purchase the evidence shows, as we think, that the defendants were in possession of the sheriff's deed which had been obtained by them for the plaintiff in the foreclosure. It is certain that for more than a year the defendants had been receiving for the plaintiff the rent of the property, all which rent they still retained in their hands, and which amounted to a little more than \$140. They were, then, at the time Townsend purchased the tax certificates, acting as the plaintiff's agents in respect to the property, with money in their hands received from the property, and Townsend's purchase must, we think, be deemed to have been made in trust for the plaintiff.

We do not, indeed, understand the defendants in their argument as seriously denying that Townsend purchased the certificate in trust for the plaintiff. They had, previously to the commencement of the action, written a letter in which they seemed to recognize their trusteeship, and in their argument, referring to the letter, they say: "We acknowledge ourselves as holding the tax certificate in trust for the plaintiff when we wrote the letter." The fact of the trusteeship existing at the time of the purchase and afterwards we may regard as settled.

The real ground upon which the defendants place their defense is what they call the bad conduct of the plaintiff in delaying to reimburse them. That we may not do them injustice, we will state their position in their own words. They say in their argument: "We fully informed the plaintiff. What was its duty, then? It was to respond by yea or nay within a reasonable time. We had stated in our letter what time we would give the plaintiff. This was ample time within which the plaintiff could have responded, letting us know what it would do. It remained silent." If we should

concede the defendants' legal proposition, that where an agent purchases a tax certificate in his own name in trust for his principal he may proceed to take a deed in his own name, and hold title as against his principal, if his principal is guilty of negligence in reimbursing him, we should still have to say that the facts of this case do not appear to bring the defendants within the rule. Certainly, an agent holding a tax certificate for his principal cannot be allowed to take and hold a tax deed as against him on account of the negligence of the principal in reimbursing him, unless the agent has made a full and fair statement to his principal of the account between them, and of the amount necessary to reimburse him.

In the case at bar, the defendants rendered no statement of any kind to their principal. They did, it is true, render a statement to one Pierson, in Chicago, under the supposition that he was acting for the plaintiff as its agent, and it seems not improbable (although there is really no proper evidence showing it) that he was an agent of some kind. But if we should concede that he was, we should still be without any proper evidence as to what his powers were; and unless he was charged with some duty in relation to the redemption of the plaintiff's land from taxes, a report to him would not be a report to the principal. A report by one agent to another agent is not necessarily a report to the principal. If the defendants desired reimbursement, and could not find an agent who they knew was clothed with power to act in the premises, they should have reported to the home office. The plaintiff itself was at all times within easy communication. The scattered interests of a life insurance company loaning money over the country, as this company appears to have been, are such that, if its agents or attorneys are guilty of any negligence, some of its interests may easily be overlooked by its officers and lost sight of. It has a right to expect that its agents will be diligent in reporting, and not content themselves with reporting to some one of whose powers they have

no reliable knowledge, and especially if, after having reported to such person, they receive no response of any kind. We are unable to find any justification on the part of the defendants in not reporting to the company's officers. While we think that their failure in this respect is fatal to their present pretenses, we think that there was another failure which is equally so. They never made a full and fair report even to Pierson. They did not state to him all the essential facts, nor show what amount was due them from the plaintiff. Their report was not only deficient, but in one of its affirmative statements was misleading. They reported neither the date of their expenditure nor the amount expended. Both of these facts were essential to a fair accounting. As agents, they were not entitled to speculate out of their principal. They were entitled to be reimbursed only the actual amount expended, with interest; and for their services they were entitled, of course, to reasonable compensation. What they did was to communicate the auditor's statement of the amount then necessary to redeem. This amount they placed in their account as a debit against the plaintiff, and they credited the plaintiff with rents received. The amount necessary to redeem included, of course, interest, which could not accrue to the defendants upon their account. They were entitled to only six per cent upon the amount advanced by them from the time of advancement. As they had money received as rents in their hands, their real advancement was only the difference between what they had and the whole amount paid, which, it appears, was less than \$40. It is said, it is true, that the defendants were not bound to protect the plaintiff against a tax deed, and were not bound to use the plaintiff's money for such purpose, and that Townsend did not in fact use it. But the fact is that they did buy the tax certificate for the plaintiff, as appears by their own acknowledgement of the trusteeship; and, having bought it, the law will under the circumstances apply the plaintiff's money in their hands, and regard the application as made at the time of the pur-

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chase. The defendants' report, therefore, was not only deficient, but affirmatively wrong, and was not sufficient, even if it had been made to the right person, to put the plaintiff in default. While we say this, we do not wish to be understood as charging the defendants with a conscious intention to perpetrate a moral wrong. They are attorneys in large practice, and, so far as we know, of entirely unimpeachable character. But we think that they misconceived in some respects their professional duty and their legal rights.

We think that the tax deed must be set aside. The case, however, does not seem to be in a proper condition to justify the entry of a decree in this court. Taxes have probably been paid, and rents have probably accrued and been paid, during the progress of litigation. There may be some other matters which should be taken into account. The case must therefore be remanded for an accounting.

REVERSED.

HULL V. THE CHICAGO, BURLINGTON & PACIFIC R'Y CO. ET AL.

1. **Jurisdiction: NOT LOST BY CHANGE OF JUDGES BETWEEN SUBMISSION AND DETERMINATION OF CAUSE.** Where an equity cause was tried and submitted in the circuit court, and taken under advisement by the court, under an agreement that the decree should be entered in vacation, but before the cause was determined, by a division of the circuit, another judge came to preside over the court of that county, to whom the cause was transferred, *held* that the court did not lose jurisdiction of the cause, and that the action of the new judge in considering and determining the case without notice to the parties was at most erroneous, and not void, and that, on appeal from the decree so entered, this court has jurisdiction to try the cause *de novo*.
2. **Railroads: RIGHT OF WAY DEED: AGREEMENT TO FENCE, ETC.: CONSIDERATION.** Where a deed conveying a right of way for a railroad for a certain named sum contained an agreement on the part of the company to fence the right of way and build crossings, *held* that this agreement formed a part of the consideration for the right of way.
3. ———: ———: ———: **MEASURE OF DAMAGES FOR FAILURE TO PERFORM.** In such case, for a failure on the part of the company to build

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the fence and put in the crossings as agreed, the measure of damages is the difference in the rental value of the land. *Varner v. St. Louis & C. R. R'y Co.*, 55 Iowa, 677, followed.

4. ——— : ——— : ——— : DAMAGES FOR FAILURE, AND FOR TRESPASS AND NEGLIGENCE: RIGHT TO LIEN. Where plaintiff obtained judgment against the defendant company for breach of an agreement, contained in a right of way deed, to fence and build crossings along and over the right of way, he was entitled to a lien therefor upon the property of the company; but he was not entitled to a lien for a judgment on account of trespass, nor for a judgment on account of negligence in constructing the road, whereby the premises were overflowed.
5. **Practice in Supreme Court:** CAUSE TRIABLE DE NOVO REMANDED IN INTEREST OF JUSTICE. Although this cause is triable *de novo* in this court, yet, as the record is such that it is impossible to determine therefrom what judgment should be rendered, it is remanded to the court below, with leave to both parties to plead in accordance with the suggestions contained in this opinion.

Appeal from Mahaska Circuit Court.

WEDNESDAY, APRIL 8.

THE facts are stated in the opinion.

R. A. Sankey, for appellants.

L. C. Blanchard, for appellee.

SEEVERS, J.—Several causes of action are stated in the petition. The *first* is that, in consideration of the conveyance of the right of way over certain real estate of the plaintiff, the defendant had agreed to fence the right of way, and put in two open crossings, which it had failed to do; *second*, that the defendant had entered upon plaintiff's premises outside of the right of way, and had committed a trespass by cutting ditches and removing earth; *third*, that the defendant had carelessly and negligently constructed its road by the erection of an embankment, so as to obstruct the natural flow of water, and failed to construct any culvert in the embankment; *fourth*, the petition states that the contract for the right of way was made with the Chicago, Burlington &

Pacific Railroad Company, and that the defendant, the Central Iowa Railway Company, had purchased the road-bed, the right of way and franchise of the former company, and was operating the road with actual and constructive notice of the plaintiff's rights and claim to a lien on the road, and that the rights of the Central Railway Company were inferior and junior to those of the plaintiff.

The plaintiff asked that the cause be transferred to the equity side of the court, and tried as a suit in equity, and that at the final hearing the plaintiff have judgment, and that the same be declared a special lien on the road-bed, right of way and franchise; that the defendants be enjoined from operating trains thereon, and decreed specifically to perform its contract in relation to fencing and crossings, and for general relief. The defendants denied the allegations in the petition. The court found for the plaintiff, and allowed him damages as follows:

For failure to erect fences,	-	-	-	\$400 00
For failure to put in crossings,	-	-	-	150 00
For trespass outside of right of way,	-	-	-	10 00
Damages caused by overflow of water,	-	-	-	120 00
Loss of rents,	-	-	-	150 00
Interest from June, 1882, to July, 1883,	-	-	-	100 00
				<hr/>
				\$930 00

Judgment against both defendants was rendered for the amount above stated, which was made a lien on the road-bed, right of way, side tracks, and all rights and franchise of the defendant in the counties of Jasper and Mahaska, and a special execution was ordered to be issued for the sale of the same. The defendants appeal.

I. The cause was tried by consent of parties as an equitable action, and it will be so tried and determined in this court. The cause was submitted to the court at the April term, 1884, and it was agreed by counsel that the decree should be entered in vacation. The Hon. W. R. LEWIS was

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at that time sole presiding judge of said court. Subsequently the general assembly passed an act creating an additional circuit court in the sixth judicial district, and under the provisions of said act Judge LEWIS ceased to be judge of the circuit court of Mahaska county. The Hon. JOHN A. HOFFMAN became judge of said court by the appointment of the governor, and entered upon the discharge of his duties about the first day of June, 1884. Judge LEWIS, not having determined the case, transferred it to Judge HOFFMAN, who, without notice to the parties, proceeded to determine the same, and caused the decree aforesaid to be entered.

Counsel for the appellants insist that Judge HOFFMAN had no power or authority to determine the case and cause a decree to be entered in vacation, and that it is absolutely void, and that, therefore, this court has no jurisdiction. If this is not claimed in terms, it is in substance. Without stating our reasons at length, we deem it sufficient to say that in our opinion the circuit court of Mahaska county undoubtedly had jurisdiction of the parties and the subject-matter, and that, as Judge HOFFMAN was judge of said court, his action in considering and determining the case without notice to the parties, to the end that they might be heard, was at most erroneous only, and that we have jurisdiction, and the right to try and determine this cause as other actions in equity are tried and determined by this court.

II. The plaintiff conveyed the right of way in consideration of the receipt of \$500. The deed is substantially in the usual form, except a provision in these words: "The said company agrees by June 1, 1882, to fence said right of way on both sides with a lawful fence, and put in two open crossings at such places as the grantors may designate on said premises." Counsel for appellant contend that the right of way was conveyed in consideration of the money paid, and that the provision in relation to fencing is entirely independent, and without any consideration to support it. In this we do not concur; but think, as the provision in relation

to fencing is contained in the deed, it was the understanding of the parties that it formed a part of the consideration for the conveyance of the right of way.

III. The next question we shall consider is, what is the measure of the plaintiff's damages under the contract? Substantially, there is no difference as to this question between this case and *Varner v. St. Louis & C. R. R'y Co.*, 55 Iowa, 677. It was there held that the difference in the rental value of the premises constituted the measure of the plaintiff's damages. It will be observed that the circuit court gave the plaintiff damages for failure to erect the fence and put in the crossings, and also, as we understand, the difference in the rental value of the premises. Following the case above cited, we think the court erred in rendering judgment for the two items first above stated. For reasons hereafter stated, we do not determine whether the amount allowed for the other items as damages is sustained by a preponderance of the evidence or not. Attention, we think, should be called to the fact that the defendant contracted to put in crossings at such places as the plaintiff might designate; but we have been unable to find any sufficient evidence that the plaintiff did designate such places, and if he did not do so we have serious doubts whether he can recover any damages for such failure.

IV. There is another thing which affects the amount the plaintiff is entitled to recover, to which attention should be called. The defendant contracted to build the fence and put in the crossings by the first day of June, 1882, and this action was commenced on the twenty-sixth day of August, 1882. Now, it is evident that the difference in the rental value of the premises from June to the latter part of August following did not amount to very much. It clearly appears from the evidence that the plaintiff did not sustain damages during said time in the amount allowed by the court, and this is true as to the damages allowed because of the overflow. The court, no doubt, allowed damages up to the time of the

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submission, or possibly only up to the time when the plaintiff closed his evidence. There is not, however, any pleading on file claiming damages up to either period. We do not determine that one was required, but we have quite decided convictions that this case was not tried on the proper theory. The evidence was not taken and confined to the rental value of the premises, but included the difference in the value of the farm in the market, and the attention of counsel seems to have been directed mainly to that and other immaterial questions.

V. On the whole, we have thought that fair and even-handed justice to both parties requires that this case should not be finally determined here on this record, for the reason that under it and the evidence we are unable to determine what judgment should be rendered. No substantial advantage would result to either party if we should dismiss the petition on the merits, unless that would constitute a bar to another action for such damages as were incurred after the commencement of this action, and this we are content to say is doubtful.

VI. The circuit court correctly held, under the authority of the cited case, that the plaintiff was entitled to a lien for damages sustained by the failure to fence and put in crossings. But we think it erred in deciding that he was entitled to such a lien for trespass, or for the negligent construction of the road, and thereby causing water to overflow the plaintiff's premises. We know of no legal or equitable principle under which the plaintiff is entitled to such a lien. There is no statute or contract entitling the plaintiff thereto.

It is therefore ordered that this cause be remanded to the court below, with leave to both parties to replead, so as to clearly present the main question of damages herein considered, and also as to the question of specific performance, to which it seems to us the plaintiff is entitled; or if he chooses to erect the fence, then a recovery for its value, and such other appropriate relief as he is entitled to. **REVERSED.**

23-139

MCALISTER V. SAFLEY.

1. **Venue: CHANGE OF TO COUNTY OF DEFENDANT'S RESIDENCE: FACTS NOT ENTITLING TO.** Where one is sued upon a contract in a county of which he is not a resident, along with other defendants who are residents of that county, he cannot have the cause removed to the county of his residence, under section 2587 of the Code, on the ground that plaintiff has failed to obtain judgment against the other defendants, so long as the right to a judgment against such other defendants remains undetermined.
2. **Sale: OF GOODS TO BE COMPLETED: RESCISSION: FACTS NOT ENTITLING TO.** Where defendant entered into an absolute agreement to pay a certain price for a granite monument, to be completed, inscribed and erected according to the terms of the contract, she had no right to rescind the contract; and though she notified the vendors before the monument had been inscribed or erected that she would not take it, yet it was their right to complete and erect it according to their agreement, and upon doing so they were entitled to recover the contract price.

65	719
889	530
90	41
65	719
100	748
65	719
107	844
65	719
133	720

Appeal from Muscatine District Court.

TUESDAY, APRIL 21.

ACTION on a written contract for the price of a granite monument. There was judgment for plaintiff against defendant, J. G. Safley, and she appeals.

Stivers & Louthan and *D. C. Cloud*, for appellant.

Hoffman, Pickler & Brown, for appellee.

REED, J.—The contract sued on is in the following language:

“\$700.

TRAER, December 22, 1880.

“I have this day bought of Webster & Williams, Muscatine, Iowa, one monument, W. Chamberlain, Des Bay of Funday granite. Total height about sixteen feet. Inscription, viz., as heretofore given. Husband inscription on front of die, (to the beloved memory of John G. Safley). For which I promise to pay the sum of seven hundred dollars one year

McAllister v. Safley.

from date, with seven per cent interest after maturity; further time given at seven per cent if desired, said stone to be delivered at Traer and set soon.

[signed]

"MRS. J. G. SAFLEY."

The following writing was indorsed on the back of the contract:

"I agree to give Mrs. Safley the privilege of taking the English granite monument on hand at the same price. (\$700,) or the large Hurricane Island monument at \$800, if she should so elect, if she should call at our works by next Thursday, Dec. 30, 1880.

[Signed]

"W. WEBSTER,
"Pr. W. & W."

The contract was assigned to plaintiff. The firm of Webster & Williams, and the individual members of the firm, were made parties defendant, plaintiff claiming that they were liable as guarantors of the contract. There was no appearance by the firm; but Webster answered, alleging that the contract of guaranty on which plaintiff sought to recover was executed by Williams after the dissolution of the partnership, and that he was not bound thereby. Williams made no defense, and judgment was entered against him by default.

Defendant Safley resides in Tama county. When the case came on for trial, it was agreed that the only issues to be tried

1. VENUE:
change of to
county of de-
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to.

at that time were those arising between plaintiff and defendant Safley. It was also agreed that the case should be tried to the court on an agreed statement of facts. After plaintiff's counsel had made their opening argument, defendant filed a motion to dismiss the case as to her, on the ground that she was a resident of another county, and no judgment had been obtained against her co-defendants, and that the action had been abandoned as against them. The default and judgment against defendant Williams was not taken until appellant asked and obtained leave to file the motion to dismiss. The overruling

of this motion is assigned as error. It is claimed that, under the provisions of section 2587 of the Code, appellant was entitled to have the case dismissed as to her. The section is as follows: "When an action * * * is against several defendants, some of whom are residents and others non-residents of the county, and the action is dismissed as to the residents, or judgment is rendered in their favor, or there is a failure to obtain judgment against such residents, such non-residents may, upon motion, have said cause dismissed. * * *" We think the facts of the case afford no ground for dismissing it under the provision of this section.

When appellant asked leave to file her motion to dismiss, the action was still pending against all the other defendants. There had not been a failure to obtain judgment against them within the meaning of the section. Plaintiff asserted a claim in his petition upon which, if he could establish it, he was entitled to recover against all of the defendants. Williams, it is true, was making no defense, and judgment by default might at any time have been taken against him; and this is also true as to the partnership of Webster & Williams. But Webster had answered, and his answer raised an issue of fact, which must be tried before judgment could be rendered either in his favor or against him. It cannot be said, in view of these facts, that there was a "*failure* to obtain judgment" against these parties. There was no evidence of any intention by plaintiff to abandon the prosecution of his claim against them; and, to constitute a *failure* to obtain judgment against them, there must have been either some final disposition of the case as against those defendants, or an abandonment by plaintiff of his claim against them.

II. The matter pleaded in defense by appellant is that, after the contract was entered into, and before anything had been done by Webster and Williams towards completing the monument or delivering it at Traer, she notified them that she would not receive it, and requested them not to complete it

2. SALE: of
goods to be
completed:
rescission:
facts not en-
titled to.

McAllister v. Safley.

or set it. It is shown by the agreed statement of facts that, on the next day after the contract was entered into, defendant wrote a letter to Webster & Williams, in which she expressed regret that she had entered into the contract, and requested them to return it to her, and that in about one week afterwards she sent them the following dispatch by telegraph: "*To Webster & Williams: Order given Mr. Webster countermanded until further orders.*" It is also shown that Webster & Williams received this letter and telegram before they had done anything either towards cutting the inscription on the monument or sending it to Traer; also, that they answered defendant's letter, and informed her that they declined to return the contract to her, and that they afterwards cut the inscription on the monument and shipped it to Traer, and set it up at the grave of the defendant's husband. It is also shown that at the time the contract was entered into they were the owners of the monument, and had it in possession, and that it was wholly completed, except the cutting of the inscription.

On this state of facts we think there can be no question of defendant's liability for the contract price of the monument. It may be conceded that the contract was executory, and that the property in the monument did not vest in defendant upon the execution and delivery of the written agreement. But neither of the parties reserved a right of rescission. Defendant's undertaking to pay the stipulated price was contingent on the single condition that Webster & Williams would cut the inscription on the monument, deliver it at Traer, and set it up at the grave of her husband. She agreed absolutely that upon the happening of these conditions she would pay the price agreed upon at the stipulated time. There was no failure on their part to perform their undertaking. She therefore had no grounds for rescinding the contract. She did not claim the right to terminate it because of any default on their part, but sought to do so because she concluded she had not acted wisely in entering

Arderly v. The Chicago, Burlington & Quincy R'y Co.

into it. But the law will not permit one party to an agreement to terminate it at his pleasure, unless the right to do so is reserved in the contract itself.

It is said by this court in *Moline Scale Co. v. Beed*, 52 Iowa, 307, that the true rule in cases of executory contracts for the purchase of personal property is "that, when everything has been done by the vendor which he is required by his contract to do, and the manufactured property in its completed condition is tendered to the purchaser, * * * the vendor may recover the contract price." That the facts of this case bring it within this rule there can be no doubt.

The judgment of the district court will be

AFFIRMED.

ARDERY V. THE CHICAGO, BURLINGTON & QUINCY R'Y CO.

65	723
91	343

1. **Venue: APPEAL FROM JUSTICE OF PEACE: CHANGE FROM CIRCUIT COURT: TO WHAT COURT TAKEN.** A change of venue from the county is not allowed in cases appealed from justices' courts to the circuit court. (Code, § 2590, sub-div. 5, as amended by chapter 118, Laws of 1878.) Hence, in this case, where a motion for a change was made by defendant on account of the alleged prejudice of the circuit judge, and the application also alleged like prejudice on the part of the district judge of the county, and the circuit court gave defendant its election to take a change to the district court of the county, which was refused, *held* that the motion was properly overruled. [But see *Schuchart v. Lammey*, 62 Iowa, 197, where it is held that the district court has no jurisdiction, even upon a change of venue, of a civil cause appealed from a justice of the peace.—REPORTER.]
2. **Supreme Court: JURISDICTION: APPEAL ON CERTIFICATE OF TRIAL JUDGE.** Where the amount in controversy does not exceed \$100, this court has no jurisdiction to determine any question not certified by the trial judge.
3. **—: —: AMOUNT IN CONTROVERSY: HOW DETERMINED: COSTS.** It is the amount in controversy, *as shown by the pleadings*, which determines the jurisdiction of this court; and where a cause comes from the circuit court which has been appealed from a justice's court, the costs made before the justice do not enter into the amount in controversy in determining the question of jurisdiction.

 Ardery v. The Chicago, Burlington & Quincy R'y Co.

Appeal from Marion Circuit Court.

TUESDAY, APRIL 21.

THIS is an action to recover a judgment against defendant for the alleged careless and negligent killing of a horse at a highway crossing by one of defendant's trains. There was a trial by jury; verdict and judgment for plaintiff. Defendant appeals.

Ayres Bros., for appellant.

Hayes Bros., for appellee.

ROTHROCK, J.—I. The action was originally commenced before a justice of the peace, where a trial was had and judgment was rendered for the plaintiff, from which the defendant appealed to the circuit court. At the November term, 1883, the cause was tried to a jury in the circuit court, and a verdict was returned for the plaintiff, which was set aside on application of defendant. In March, 1884, the defendant made an application to change the place of trial of the cause from said circuit court on the ground of the prejudice of the judge thereof. Said application also set forth that the judge of the district court of Marion county was so prejudiced against the defendant that defendant could not obtain a fair trial before him. The defendant was given its election to take a change of venue to the district court of Marion county, which was refused, and thereupon the motion was overruled. The circuit court, being of the opinion that the amount in controversy, as shown by the pleadings, did not exceed \$100, made the following certificate: "At defendant's request, the court made the following certificate: It is desirable to have the opinion of the supreme court of Iowa on this question of law, to-wit: In case of an appeal from a justice of the peace, and due application and affidavits showing the prejudice of

1. VENUE:
appeal from
justice of
peace: change
from circuit
court: to
what court
taken.

both the circuit and district judges of the county, can a change of the place of trial be had to another county; that is, to another district?"

Section 2590 of the Code, as amended by chapter 118 of the Laws of 1878, provides that "a change of the place of trial in any civil action may be had in any of the following cases: (1) When the county in which the action is pending is a party thereto, if the motion is made by the party adversely interested, and the issue triable by jury. (2) When the judge is a party, or is directly interested in the action, or is connected by blood or affinity with any person so interested nearer than the fourth degree. (3) Where either party files an affidavit, verified by himself and three disinterested persons not related to the party making the motion nearer than the fourth degree, nor standing in the relation of servant, agent, or employe of such party, stating that the inhabitants of the county, or the judge, is so prejudiced against him that he cannot obtain a fair trial. (4) By the written agreement of the parties and their attorneys. (5) If the issue is one triable by jury, and it is made apparent to the court or judge that a jury cannot be obtained in the county where the action is pending;—then, upon the application of either party, a change of place of trial shall be granted to the nearest county in which a jury can be obtained; provided, however, that not more than two changes to either party of the place of trial shall be allowed for any of the causes enumerated in this action; nor shall a change of venue from the county be allowed in case of appeal from a justice of the peace. * *."

This provision of the law appears to us to be too plain for discussion, so far as the question now under consideration is involved. The language is plain, certain and unambiguous: "nor shall a change of venue from the *county* be allowed in case of appeal from a justice of the peace." It is useless to consider what was intended by the law-making power in enacting this statute, aside from the statute itself. It is a law fixing the rights of parties as to the change of the *place*

Ardery v. The Chicago, Burlington & Quincy R'y Co.

of trial, and we must hold that the legislature intended just what the language used plainly imports. We think that a discussion of the question would be merely "darkening counsel by words, without knowledge." The circuit court correctly held that no change from the county was authorized by law.

II. The amount claimed by the plaintiff before the justice of the peace was \$100 damages, and costs. No interest was claimed nor demanded. There is no certificate of the trial judge authorizing an appeal, excepting that above referred to. The plaintiff makes the question that the amount in controversy, as shown by the pleadings, does not exceed \$100, and that this court has no jurisdiction of any question excepting that certified by the trial court. The position appears to us to be well taken. The precise question was so determined by this court in *Hays v. Chicago, B. & Q. R'y Co.*, 64 Iowa, 593.

Counsel for appellant urge that the costs which accrued before the justice of the peace should be taken into account in determining the amount in controversy. The statute provides that the amount in controversy, "as shown by the pleadings," determines the right to appeal. The costs are merely incidental to the action, are not shown by the pleadings, and cannot be considered as any part of the amount in controversy. See *Hakes v. Dott*, 54 Iowa, 17; *Spiesberger Bros. v. Thomas*, 59 Id., 606; and *Curran v. Excelsior Coal Co.*, 63 Id., 94.

This court having no jurisdiction of any question in the case excepting that determined above, the judgment of the circuit court is

AFFIRMED.

2. SUPREME court: jurisdiction: appeal on certificate of trial judge.

3. —: amount in controversy: how determined: costs.

MORRIS V. THE CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.

1. **Estates of Decedents: JURISDICTION TO APPOINT ADMINISTRATOR.**

In any case where an administrator would have a right of action in this state for the collection of a claim, the circuit court has jurisdiction to appoint an administrator to make the collection, no matter where the decedent resided at the time of his death.

2. ——— : **APPOINTMENT OF ADMINISTRATOR: QUALIFICATION BEFORE APPOINTMENT.** The appointment of an administrator is not invalidated by the fact that his oath was taken and bond made before his appointment.3. **Jurisdiction: CAUSE OF ACTION ARISING UNDER LAWS OF ANOTHER STATE: RULE STATED AND APPLIED.** Where a right of action accrues by virtue of a statute of any state, the action may be maintained in the courts of any other state where the statutes relating to the same subject are of a similar import, though they be not precisely the same. Indeed, it would seem to be sufficient if the action be not contrary to the public policy or the law of the state where the suit is brought. Accordingly, where the administrator of the decedent had a right of action in the state of Illinois, under the statutes of that state, on account of the negligence of the defendant, resulting in the death of the decedent, *held* that the action was transitory, and might be prosecuted in this state,—the statutes of the two states relating thereto being substantially the same. Compare *Boyce v. Wabash R'y Co.*, 63 Iowa, 70.

Appeal from Polk Circuit Court.

TUESDAY, APRIL 21.

THE plaintiff alleged in his petition that he had been duly appointed administrator of the estate of Michael Quigley, deceased, by the circuit court of Polk county, in this state, of which county said deceased was late a resident, and that said Quigley died at Rock Island, Illinois; that he was an employe of the defendant; and that he died from injuries received while coupling cars for the defendant at Rock Island. He further alleged the necessary facts showing that the deceased received the injury from which he died by reason of the negligence of the defendant, and without any contributory negligence on his part. The defendant, by its answer, denied the averments of the petition, and denied that the

65	727
91	252
65	727
114	145
65	727
125	600
65	727
1130	309

decedent was a resident of this state, and denied that plaintiff was administrator of his estate; averred that decedent was a resident of Illinois at the time of his death; and denied the right of the plaintiff to maintain an action in the courts of this state for an injury causing the death of said Quigley in the state of Illinois. There was a demurrer to that part of the answer which raised the question as to the right of the plaintiff to maintain the action. The demurrer was sustained, to which defendant excepted. The cause was tried on its merits, and there was a verdict and judgment for the plaintiff. Defendant appeals.

Wright, Cummins & Wright, for appellant.

Baylies & Baylies, for appellee.

ROTHROCK, J.—I. Counsel for appellant present three propositions in argument. The first is that the circuit court of Polk county had no jurisdiction to appoint an administrator of the estate of Michael Quigley, deceased. The argument is based upon the claim that the deceased left no estate within this state to be administered upon; that whatever claim existed against the defendant for damages for the death of Quigley arose under the law of Illinois, where the injury was received, and where the death occurred; and that by the law of that state a right of action was not in the estate, but in the wife, husband, or next of kin, if there were any surviving. If it be correct, as claimed by appellant, that no right of action existed in this state, it is probably true that there was no estate upon which to administer. But if an action may be maintained in this state by an administrator, we think it necessarily follows that the circuit court had jurisdiction to make the appointment. And it is immaterial in such case whether the decedent was a resident of the state of Illinois or of this state. The power to appoint an administrator in this state for the sole purpose of collecting a claim due to the decedent, has been too long authorized and recognized to be now questioned, and we do not understand

counsel to claim otherwise. The alleged want of power in the court to make the appointment is founded on the claim that there was no estate to be administered upon. As will be seen when we come to the third point in this opinion, we hold that the action may be maintained. The point now under consideration demands no further attention.

II. It appears from the record made in the appointment of the plaintiff as administrator that the application for the

2. ———: ap-
pointment of
administra-
tor: qualifica-
tion before
appointment.
appointment was sworn to on the third day of July, 1882. The bond, and the jurat to the oath of the administrator indorsed thereon, were dated the same day. All of these papers were filed in the circuit court on the fifth day of July, 1882, and on that day the bond was approved, the order of appointment made, and the letters of administration issued. It is urged that the appointment was void because the oath was taken and the bond made before the appointment. Section 2362 of the Code requires that an administrator must give a bond before entering on the discharge of his duties, and section 2363 provides that he must take and subscribe an oath of office. The bond is required to be approved by the clerk. We think that the signing of the bond and oath before the appointment did not affect the jurisdiction of the court. It is surely no valid objection to the action of the court that a party appears before it with a bond and oath already prepared. They are presented for the approval and action of the court, and it is wholly immaterial whether dated before or after the order of appointment. We think the record shows that the plaintiff properly qualified as administrator.

III. The next question presented by counsel for appellant is, can an action be maintained in Iowa, by an Iowa administrator, upon this claim arising under the statute of Illinois? The statute of the state of Illinois authorizing actions for damages for the death of a person, caused by the wrongful act, neglect or default of another, is as follows:

3. JURISDIC-
TION: cause
of action aris-
ing under
laws of
another state:
rule stated
and applied.

"Section 1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in such case, the person who, or company or corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

"Sec. 2. Every such action shall be brought by and in the name of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars; provided, that every such action shall be commenced within two years after the death of such person."

Michael Quigley, the deceased, left a widow and parents surviving him, and it is not disputed that an action would lie in the state of Illinois by an administrator appointed in that state. The law expressly so provides. Under the law of this state, "when an act produces death, the damages shall be disposed of as personal property belonging to the estate of the deceased, except that, if the deceased leaves a husband, wife, child or parent, it shall not be liable for the payment of debts." Code, § 2526. It will thus be seen that in both states the administrator of the deceased is the proper party plaintiff in the action, and it seems to us to follow that in both jurisdictions the administrator is required to receive

the amount recovered, and distribute it as provided by the respective statutes. By the statute of Illinois the assessment of the recovery is limited to \$5,000. No such limitation is placed upon the statute of this state. By the statute of Illinois the recovery shall be for the exclusive benefit of the widow and next of kin of the deceased, while in Iowa the recovery shall be disposed of as other personal estate, except that it shall not be liable for the payment of debts, if the deceased leaves a husband, wife, child or parent. This distribution of the recovery by the administrator in this case would, therefore be to the same persons as if the administration and action were had in the state of Illinois, and a judgment in this state would be a bar to an action in Illinois.

The plaintiff pleaded the statute of Illinois in his petition, and made his proof that the deceased left a wife and parents surviving him, and the court instructed the jury, in effect, that the recovery must be had as provided by the Illinois statute. The case differs from that of *Hyde v. Railroad Co.*, 61 Iowa, 441, where we held that no recovery could be had in the courts of this state for an injury resulting in death in Missouri, because, in that case, recovery was claimed under the statute of this state, and we held that, if an act of the character complained of, done in that state, did not create a liability there, there was no liability anywhere.

In *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y., 48, where an action was brought in that state against the defendant by an administrator for damages for a wrongful act causing the death of the intestate in the state of Connecticut, it was held that the action could be maintained. The ground of the decision is that, although the right of action did not exist at common law, but was created by statute, yet it was transitory in its nature, and could be enforced in a foreign country where the laws of the country are of a similar nature. In other words, it is held that the action will lie unless the law and policy of the forum forbids its maintenance. The court said: "The rule here laid down is just and reasonable,

Morris v. The Chicago, Rock Island & Pacific R'y Co.

and it is not essential that the statute should be precisely the same as that of the state where the action is given by law, or where it is brought, but merely requires that it should be of similar import and character." It appears that there was such a law in the state of New York.

In *Dennick v. Railroad Co.*, 103 U. S., 11, plaintiff, as administrator, brought suit in the state of New York to recover damages for the death of the intestate by an accident on the defendant's road in New Jersey. It was contended that the action would not lie because it was only cognizable in the courts of New Jersey. It was held that the action could be maintained, and the decision is placed upon the broad ground that the action is transitory, and may be maintained in any forum, and that the venue is immaterial. We think that it has been generally held that where a right of action accrues by virtue of a statute of any state, the action may be maintained in any other state, if not contrary to the public policy or law of the place where suit is brought. See *King v. Sarria*, 69 N. Y., 24; *Phillips v. Eyre*, L. R. 6 Q. B., 1; *Wall v. Hoskins*, 5 Ired. Law, 177; *Herrick v. Minneapolis & St. L. R. Co.*, 31 Minn., 11; *Boyce v. Wabash R'y Co.*, 63 Iowa, 70. In the last-named case, we cited with approval the cases of *Dennick v. Railroad Co.* and *Leonard v. Navigation Co.*, *supra*. It is not to be denied that there are cases not in accord with the rule of those above cited. See *Woodard v. Michigan S. & N. I. R. Co.*, 10 Ohio St., 121; *Richardson v. New York Cen. R. Co.*, 98 Mass., 85; and *McCarthy v. Chicago, R. I. & P. R. Co.*, 18 Kan., 46. The decisions in these and other cases relied upon by counsel for appellant we cannot approve, and we expressed our dissent from them in *Boyce v. Wabash R'y Co.*, *supra*.

It is not necessary that we should go further in this case than to hold that the action can be maintained, because the recovery sought is in accord with our laws and the policy of our state; and yet we think, as is said in *Dennick's Case*, *supra*: "It would be a very dangerous doctrine to establish

Smith v. Scoles et al.

that in all cases where the several states have substituted the statute for the common law, the liability can be enforced in no other state but that where the statute was enacted and the transaction occurred."

AFFIRMED.

SMITH V. SCOLES ET. AL.

65	733
88	132
65	733
129	644

1. **Boundaries: PETITION FOR COMMISSION TO ESTABLISH: JURISDICTION OF COURT: DISMISSION OF PETITION: APPEAL: RES ADJUDICATA.** Upon the hearing of a petition to appoint a commission to establish a boundary line, under chapter 8, Laws of 1874, (McClain's St., p. 862,) the court has jurisdiction to look into the nature of the controversy, and to dismiss the petition, if the controversy does not appear to be such as to justify the appointment of a commission. From such order of dismission an appeal would lie, but while the order stands it is an adjudication of the matter as between the parties, and bars the plaintiff from maintaining another action against the same defendants for the same purpose.
2. ———: ———: **WHAT IT SHOULD STATE: PRACTICE.** The petition in such a case should state the facts in dispute sufficiently to enable the court to determine the nature of the controversy. Failing to do so, it would be subject to a motion for a more specific statement.
3. ———: **COMMISSION TO ESTABLISH: OFFICE OF.** Such a commission has its proper place where a boundary, as called for by the deeds under which the parties hold, is to be discovered by the application in the field of the technical knowledge and practice of surveying, and where each party's claim is supposed to be conditioned upon the discovery of the boundary. Where the dispute turns upon some other question of fact, as that of adverse possession, or upon a point of law, a commission should not be appointed. See *Gates v. Brooks*, 59 Iowa, 514.

Appeal from Jasper District Court.

TUESDAY, APRIL 21.

THIS is a proceeding to establish a boundary line. The plaintiff, Hannah E. Smith, in her petition states in substance that she is the owner of three 40-acre tracts in section 21,

township 80 N., of range 19, in Jasper county, to-wit, the W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ and N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$. She also states that the defendants own the three forties on the west; that the boundary line between her land and that of the defendants is lost; that she is desirous of having the same established, but that the parties are unable to agree; and she asks for the appointment of a commission to make a survey, as provided in chapter 8 of the Acts of the Fifteenth General Assembly. (McClain's St., 862.) The defendants appeared, and resisted the appointment of a commission by filing an answer setting up a prior adjudication. The plaintiff demurred to the answer. The court overruled the demurrer, and, the plaintiff electing to stand upon her demurrer, the court dismissed her petition, and rendered judgment against her for costs. She appeals.

Alanson Clark, for appellant.

Harrah & Myers, for appellees.

ADAMS, J.—The answer avers “that on May 6, 1881, the plaintiff filed her petition at law, in the district court of said county, relative to the present controversy.” It then sets out the finding and decision of the court, in which the plaintiff's petition was dismissed, upon the ground that there did not appear to be any such loss of boundary or controversy between the parties as to justify the appointment of a commission. It does not expressly appear from the answer that the parties were the same as those now before the court, but we infer from the finding of facts in the original case, and the manner in which the present case is presented, that the parties were in fact the same. At all events, no objection is made to the answer upon that ground, and we shall not raise the objection ourselves.

We have, then, a case where the appointment of a commission is asked for the purpose of establishing a lost boundary, and the plaintiff, by her demurrer to the answer, concedes

that in a previous action, instituted by her against the same parties as defendants, she asked for the appointment of a commission; that the controversy is the same in this action as in that; and that the court in that action dismissed her petition on the ground that the controversy was not such as to justify the appointment of a commission. It is, of course, not contended by the appellant that where a court has jurisdiction to determine a matter, and does determine it, it can be properly called upon again to determine the same matter between the same parties.

The only real question in the case appears to be as to whether, in the matter of a petition for the appointment of a commission under the statute above referred to, the court has jurisdiction to look into the nature of the controversy, and dismiss the petition, if the controversy does not appear to be such as to justify the appointment of a commission. In answer to the question, we have to say that we think it has such jurisdiction. The statute provides that notice shall be served upon the owner or owners of the adjacent tract or tracts before the application can be heard. The other parties in interest have a right, then, to appear at the hearing upon the application; and we cannot think that the hearing contemplated pertains merely to the question as to who shall constitute the commission. It is true, the statute provides that "upon the filing of a proper petition, and proof of due notice as aforesaid, the court shall appoint a commission," etc. It might, therefore, be contended, and we think with much reason, that the court, in order to determine the character of the controversy, should not be required to go outside of the petition. While it was held in *Harrah v. Conley*, 82 Ill., 48, that the other parties in interest might appear and file an answer, we are not prepared to say that under our statute an answer would be allowable for the purpose of raising the question as to the nature of the controversy. The statute seems to be imperative in requiring the appointment upon the filing of a proper petition. But it does not follow

that the court cannot look into the nature of the controversy. If the petition does not state the facts sufficiently to show it, it would doubtless be the right of the other parties in interest to move for a more specific statement, and especially if an answer could not properly be filed and evidence introduced upon the issue made. Possibly, if the petition set out the lands, and stated what corners and boundaries were lost or destroyed, or in dispute, that should be deemed a proper petition, and justify the appointment of a commission, in the absence of any objection to the petition.

But it cannot be denied that there may be a disputed boundary, and yet the appointment of a commission not be justifiable. In the matter before us, the court, in the original proceeding, seems to have thought that there was no disagreement as to the facts which should govern the question as to the original boundary, but a disagreement as to the rule of law which should be applied to conceded facts. Now, where such is really the case, there is no ground for the appointment of a commission. The sole office of a commission is to ascertain facts. We may go further and say that there may be a case of disputed boundary where the dispute pertains solely to facts, and yet where the appointment of a commission would not be proper. There seems to have been a dispute of that kind in the original case. It did not pertain to the question of original boundary, but to the question of boundary as determined by the alleged adverse possession of one of the parties. Now a commission could not properly be appointed to determine a question of disputed adverse possession. Where the question in dispute is that of adverse possession, either party has a right to a jury. This was held in *Gates v. Brooks*, 59 Iowa, 514. A commission has its proper place where a boundary, as called for by the deeds under which the parties hold, is to be discovered by the application in the field of the technical knowledge and practice of surveying, and where each party's claim is supposed

to be conditional upon the discovery of the boundary. See case last above cited.

Strictly, then, we think that the petition should state the facts in dispute sufficiently to enable the court to determine the nature of the controversy. If the court should wrongly determine it, and dismiss the petition when it should have been entertained and the commission appointed, the plaintiff would have his remedy by appeal. It would not, we think, be his right to turn around and file another petition upon the same ground. In our opinion the demurrer to the defendant's answer was rightly overruled.

AFFIRMED.

HEATH V. THE WHITEBREAST COAL & MINING CO.

1. **Master and Servant: INJURY TO MINER: KNOWN NEGLIGENCE. WAIVED AND RISK ASSUMED.** A miner cannot recover of his employer for an injury caused by a defect in the track or cars used in the mine, or by the want of appliances connected therewith, the condition of which he knew, or in the exercise of ordinary care should have known, at and before the time of the alleged injury, if the alleged defects were such as he ought reasonably to have foreseen might endanger his safety.
2. **Railroad in Coal Mine: SWITCH ON GRADE: NEGLIGENCE NOT PRESUMED.** Proof that a switch-track in a coal mine was built upon a grade, does not of itself tend to establish negligence on the part of the proprietor of the mine in so building it, for it may not have been possible to build it otherwise; (Compare *Foley v. Chicago, R. I. & P. R'y Co.*, 64 Iowa, 651;) and an instruction in this case, based on a contrary theory, was erroneous.
3. **Verdict: SPECIAL FINDING CONTRARY TO EVIDENCE: NEW TRIAL.** Where the jury makes a special finding contrary to the evidence, upon a material and important point, a fair trial cannot be presumed, and the verdict should be set aside at the instance of the party prejudiced.

Appeal from Lucas Circuit Court.

TUESDAY, APRIL 21.

THIS is an action for a personal injury, which the plaintiff
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65	737
88	329
65	737
103	671
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114	92
65	737
118	59
118	562

alleges he sustained by reason of the negligence of the defendant, while the plaintiff was engaged in the service of the defendant as a driver of cars in a coal mine. There was a verdict and judgment for the plaintiff, and the defendant appeals.

McNett & Tisdale and *Mitchell & Penick*, for appellant.

Stewart Bros., for appellee.

ROTHROCK, J.—The defendant was the owner of a coal mine in which several hundred men were engaged in mining coal. The coal was raised through a shaft about 350 feet deep. From the bottom of the shaft there was a main entry or passage-way over a mile in length, along which a railroad track was constructed for small cars, which were drawn by mules, and by which the coal was moved from side entries to the main track, and along that track to the bottom of the shaft. At a point in the main entry, about 375 feet from the shaft, a side track was constructed, which was from 60 to 70 feet in length, with both ends connected with the main track. The coal was moved up from the side entries, where it was moved onto the main track, and along the main track to the double track made by said side track; and the drivers unhitched from the loaded cars, and other drivers with other mules hitched to them, and drove them into the bottom of the shaft, and returned with empty cars, and the first named drivers took the empty cars from the side track back to be loaded at the rooms in the side entries. The grades were such that but one car load was taken up to the switch at one drive, but from there into the bottom of the shaft two or more cars were taken. In approaching the switch with a loaded car, there was a considerable up grade for some distance, and this grade continued to a point some 30 or 40 feet past the intersection of the side track, and from that point the track was level to the other end of the switch, so that cars would stand on the track without block or brake to hold them in position.

There were grades at other places in the mines, and all these grades in the railroad track existed by reason of the fact that the coal that had been removed from the mine did not lie level, but dipped and undulated.

The plaintiff entered the service of defendant on the fourth day of September, 1882. On the next day he commenced driving cars from the side entries up to the place where the change was made at the double track in the main entry. He drove from that until the morning of the ninth of September, and while returning with two empty cars he was injured by two loaded cars, which ran down the grade, where they had been hauled and left by another driver, and struck the cars which plaintiff was driving. There were some four or five other drivers engaged with plaintiff in driving from the side entries up to the point where the change was made. The plaintiff claimed that his injury was caused by the negligence of the defendant, and that such negligence consisted (1) in constructing said double track on a grade, whereby the cars left thereon were liable to escape and run down the main track and collide with other cars on the track; (2) in not providing the said cars or track with any block, safety spring-brake, trail, or any other appliance to prevent cars from running or escaping down the said grade; (3) in failing to keep a person at said side track to prevent the escape of cars therefrom. The defendant, by its answer, denied all negligence on its part, and averred that the plaintiff knew, or by the exercise of reasonable diligence might have known, of all the alleged negligence of which he complains, and yet he remained in defendant's service without objection or protest, and that the injury was caused by the negligence of a co-employee in the same general service.

The plaintiff was an experienced miner. He had been employed as driver in coal mines for five years before entering the service of defendant. He admits, in his testimony as a witness, that he knew before the accident that there was no brake, block or other appliance used by the drivers to pre-

vent the escape of the cars. Whether he admitted this or not, the fact was that for four days he drove from 40 to 60 loaded cars each day to the switch, and left them there, to be taken to the foot of the shaft, and he used no means by blocking or otherwise to retain them in place. But he claims that he did not know that the track was laid on an up grade at the point where the loaded cars were left.

The court properly instructed the jury that the plaintiff could not recover for any injury caused by any defect in the track or cars, or want of appliances connected therewith, the condition of which he knew, or in the *exercise of ordinary care should have known*, at and before the time of the alleged injury, if the alleged defects were such as plaintiff ought reasonably to have foreseen might endanger his safety. We are strongly inclined to think that, taking into account the plaintiff's experience as a miner and driver of such cars, he should be held to be charged with a knowledge of every defect of which he complains. But, as the cause must be reversed upon two other grounds which admit of no doubt, we need not pass upon this question.

II. It is charged in the petition that the track was negligently constructed, because it was laid upon a grade at the point where the loaded cars were required to be left. The burden of proof was on the plaintiff to prove the alleged negligence. There is no evidence tending to prove that the track was improperly constructed on a grade. The fact that it was laid on a grade does not tend to prove that it could properly have been laid upon a level. It was not incumbent upon the defendant to show that it was without fault in constructing the railway track; and yet the court instructed the jury as to this question the same as though there was evidence in the case proper to be submitted to the jury applicable thereto. See *Foley v. Railroad Co.*, 64 Iowa, 651.

III. The following interrogatory was submitted by the

1. MASTER and servant: injury to miner: known negligence waived and risk assumed.

2. RAILROAD in coal mine: switch on grade: negligence not presumed.

court to the jury, at the instance of the defendant: "Did the plaintiff think or believe, before his injury, that there was a safety-spring or safety-block on the track where the loaded cars were left?" The jury answered the interrogatory as follows: "*Answer.* We cannot say positively whether he did or not." The defendant objected to the answer, and the jury were directed to retire and make further answer. After an absence, the jury returned into court and answered the interrogatory in the affirmative. The jury, therefore, found as a fact that the plaintiff thought and believed, before the injury, that there was a safety-spring or safety-block on the track where the loaded cars were left. There was no evidence in the case to support this finding, and it is directly disproved by the plaintiff in his own testimony as a witness on the trial. He was asked this question: "Will you state to the jury that you thought there was a spring there; one of those spring blocks?" *Answer.* "No, sir. I can't say that I thought there was a spring block there."

We are unable to determine whether the jury believed that it was necessary to make this finding in order to sustain a verdict against the defendant. And it is immaterial what they believed the effect of it would be. It was surely an important inquiry in the case. If the plaintiff believed and had reason to believe that there was a spring or spring block that held the cars in place, of course he could not be charged with knowledge that there was no such appliance. The fact that plaintiff believed that there was no such appliance to hold the cars in place did not necessarily preclude a recovery. But it was an important fact in the case, and whether the jury would have returned a verdict for the defendant if they had found the fact according to the evidence we have no means of determining. It shows, however, that the defendant did not have a fair trial, and we think the motion for a new trial should have been sustained upon this ground. *Jef-*

Sears v. The Marshalltown Street R'y Co.

frey v. Railroad Co., 51 Iowa, 439; *Baldwin v. Railroad Co.*, 63 Id., 210.

For the errors above pointed out, the judgment of the circuit court will be

REVERSED.

65	742
92	198
65	742
104	530
65	742
125	278

SEARS V. THE MARSHALLTOWN STREET R'Y CO.

1. CITIES AND TOWNS: CONTROL OF STREETS BY GENERAL ASSEMBLY.

Where the fee of the streets is in the city for the use and benefit of the public, the general assembly has control thereof, and may prescribe the terms and conditions on which the public may use the same. See cases cited.

2. ———: HORSE-RAILWAYS IN STREETS: COMPENSATION TO LOT-OWNERS: CODE, § 464. Section 464 of the Code makes a distinction between railways proper and street railways,—the former being such as are operated by steam, and the latter those operated by horses; and under that section it is only when a railway operated by steam is built along a street that an abutting lot-owner is entitled to damages. Such right does not arise upon the construction of a railway operated by horses.

Appeal from Marshall Circuit Court.

TUESDAY, APRIL 21.

THE city of Marshalltown, by ordinance, granted to the defendant the right to construct and operate a "horse railway upon and along" certain streets in said city. Under this grant the defendant was about to construct, without changing the established grade, such a railway along a street which ran in front of certain real estate owned by the plaintiff and occupied as his homestead. The plaintiff commenced this action in equity to restrain the construction of the railway, on the ground that the plaintiff's damages as an abutting lot-owner had not been ascertained and paid as provided by law. A temporary injunction was granted, which the defendant, on

the answer and certain affidavits, moved to dissolve, which was overruled, and the defendant appeals.

Parker & Childs, for appellant.

Binford & Snelling, for appellee.

SEEVERS, J.—It is provided by statute that cities “shall also have the power to authorize or forbid the location and laying down of tracks for railways and street railways on all streets, alleys and public places; but no railway track can thus be located and laid down until after the injury to property abutting upon the street, alley or public places upon which such railway track is proposed to be located and laid down has been ascertained and compensated” as provided by law. Code, § 464. The grant of power is ample, and the city, under the statute, was fully authorized to do what it did. But the grant is limited or qualified; and in the case at bar the grant of the right to construct the railway cannot be exercised if the limitation or qualification of the right applies to street railways operated by horse-power. The fee of the street is in the city, and it is perhaps unnecessary to determine whether, in the absence of legislation, the construction and operation of such a railway creates an additional servitude on the highway, for which the abutting owner is entitled to damages, for the reason that if, under the statute, the plaintiff is entitled to damages, that ends the inquiry, and such inquiry is also ended if, under the statute, power has been granted the city to authorize the construction of the railway without compensating the abutting owner. When the fee of the street is in the city for the use and benefit of the public, the general assembly has the control thereof, and may prescribe the terms and conditions under which the public may use such streets. *Milburn v. Cedar Rapids*, 12 Iowa, 246; *City of Clinton v. Cedar Rapids & M. R. R. Co.*, 24 Id., 455; *Stanley v. City of Davenport*, 54 Id., 463.

1. CITIES and towns: control of streets by general assembly.

 Sears v. The Marshalltown Street R'y Co.

In the grant of power, both "railways" and "street railways" are mentioned. There is, then, a statutory implication that they are not the same, but that there is a material difference between the two; and that a grant of the power to authorize one would not necessarily include the other. The limitation or qualification of such power, it will be observed, is thus expressed in the statute: "But no railway track can thus be located and laid down" until the damages to the abutting owner is ascertained and compensated. As thus used in the statute, does "railway track" mean or include "street railway track," operated by horse-power? We think not. Railway track, as generally understood, means only a track on which steam is used as the motive power, and it will be presumed that the general assembly used such words in that sense, unless the context or subject-matter contemplated by the statute requires that a different meaning than that in ordinary use should be adopted. So far from this being so, the construction we have adopted is aided by the context or grant of power. If it was essential to mention both kinds of railways in the grant of power, because there was a material difference between the two, it was equally essential that both should be mentioned in the limitation to such power, if it was intended to apply to or include both.

We therefore are of the opinion that the injunction was improvidently granted, and should have been dissolved on the motion filed by the defendant.

REVERSED.

THE STATE V. KEPPEL.

1. **Criminal Law: WHAT WITNESSES THE STATE MAY EXAMINE ON THE TRIAL.** Under chapter 130, Laws of 1880, the grand jury may find an indictment upon the minutes of evidence given by the witnesses before a committing magistrate; and in such case, by section 3 of said chapter, the state is entitled on the trial to examine any witness in support of the indictment who was examined before the committing magistrate, and whose evidence was considered by the grand jury in finding the indictment, and a minute thereof returned to the court with the indictment. But where the indictment was found upon minutes which were not certified by the magistrate, as required by section 4242 of the Code, held that the grand jury was not precluded from satisfying themselves by other evidence that the minutes were correct, and that it must be presumed that they did so satisfy themselves; also, that the state did not thereby lose any right to examine the witnesses who testified before the magistrate, which it would have had had the minutes been properly certified.
2. **Burglary: EVIDENCE OF IDENTITY: RES GESTÆ.** Where the prosecuting witness and his wife both testified that defendant was the person who entered their house on the night in question, and there were other circumstances, proved by the testimony of other witnesses, which tended strongly to identify him as the criminal, the fact that the person who committed the crime stated, before he entered the house, that he was the defendant, was proper to be considered by the jury, in connection with the other circumstances in evidence, in determining the question of identity.
3. ———: **PROOF OF COMMISSION OF ANOTHER CRIME: RELEVANCY.** Where the indictment charged burglary with intent to commit an assault and battery, and the body of the crime was established, it was competent, for the purpose of identifying defendant as the criminal, to show that he knew that there was a sum of money in the house at the time, even though it tended to prove the commission of a distinct crime from that charged in the indictment, or a different motive from that alleged.

Appeal from Henry District Court.

TUESDAY, APRIL 21.

THE defendant was convicted of the crime of burglary, and sentenced to a term of imprisonment in the penitentiary, and from this judgment he appeals.

65	745
92	486
65	745
94	490
65	745
114	428
65	745
133	39

L. G. & L. A. Palmer, for defendant.

Smith McPherson, *Attorney-general*, for the State.

REED, J.—There was a preliminary examination of the defendant on the charge, and he was held to answer the same. The papers relating to the examination, which were returned by the magistrate to the district court, were at the proper time submitted to the grand jury. Among these papers was what purported to be the minutes of the evidence given by the witnesses who were examined on the preliminary examination, but no certificate of the magistrate to the truth of the minutes was attached thereto, as required by Code, § 4242. The witnesses were not called before the grand jury for examination, but the indictment was found on the minutes of evidence. And the district attorney did not serve the defendant with any notice stating the names of the witnesses whom he would examine in support of the indictment, and the substance of the testimony they would give.

On the trial defendant's counsel objected to the examination of the witnesses in support of the indictment, and moved the court to exclude their testimony, on the ground that they had not been sworn and examined before the grand jury, and the papers purporting to be the minutes of the evidence on the preliminary examination were not authenticated by the certificate of the magistrate. This objection was overruled by the court, and the witnesses were examined and gave testimony in support of the indictment.

Before the enactment of chapter 130, Laws of the Eighteenth General Assembly, an indictment could be found only upon evidence given by witnesses produced, sworn and examined before the grand jury, or furnished by legal documentary evidence. (See section 4273, Code of 1873.) But under the provisions of that chapter the grand jury may find an indictment upon the minutes of evidence given by the witnesses before a committing magistrate.

It will be observed that defendant's objection raises no question as to the power of the grand jury to find the indictment without calling the witnesses and taking their testimony under oath, when they did not have before them an authenticated minute of the evidence before the committing magistrate. But the objection relates solely to the right of the state to examine witnesses in support of the indictment, who were not examined before the grand jury, and when no properly authenticated minute of their testimony before the committing magistrate was before that body when the indictment was found.

Section 3 of chapter 130, Acts of the Eighteenth General Assembly (which is a substitute for section 4289 of the Code of 1873) provides that, when an indictment is found on the minutes of evidence of witnesses before the committing magistrate, a brief minute of such evidence shall be written out and returned by the grand jury with the indictment. Section 4275 provides that a like minute of the testimony of witnesses who have been examined before the grand jury shall be returned with the indictment. And section 4292 provides that these minutes shall be filed by the clerk of the court, and shall remain in his office as a record. And the state is entitled on the trial to examine any witness in support of the indictment who was examined either before the grand jury or the committing magistrate, and whose evidence was considered by the grand jury in finding the indictment, and a minute thereof returned to the court with the indictment.

When the grand jury returned the indictment and the minutes of the evidence, and these were filed, the record thus made became the legal evidence as to the testimony on which they acted in finding the indictment. It showed that the indictment was found on the minutes of evidence taken before a committing magistrate. When the grand jury return an indictment, the law presumes that they had before them sufficient legal evidence to warrant them in finding it. There

is a presumption also that everything was done in the course of the investigation which the law directs the grand jury to do before finding an indictment. If witnesses are produced before it for examination, the law requires that their testimony shall be given under the sanction of an oath, and, when the grand jury have returned a minute of the testimony of witnesses examined before them, the presumption is that the witnesses were sworn and gave their testimony under oath.

Before finding an indictment on the minutes of evidence before the committing magistrate, they were necessarily required to ascertain whether they had before them a true minute of the evidence given by the witnesses who were examined on the preliminary examination. If the certificate prescribed by section 4242, had been attached to the minutes, this would have been competent and sufficient evidence of the fact.

In the absence of such certificate, however, they were not precluded from all inquiry on the subject. The fact might be proven by other evidence, and, as they acted in finding the indictment on the paper which they had before them, the presumption is that they ascertained by satisfactory and competent evidence, before taking such action, that it was a true minute of the evidence of the witnesses before the committing magistrate. Upon the presumptions arising from the record, the state was entitled to examine the witnesses objected to in support of the indictment.

II. Defendant is accused, in the indictment, of breaking and entering the dwelling house of Albert Johnson, in the night-time, with intent to commit the crime of assault and battery. The evidence shows that on the night in question some person went to the house of Johnson, after he and his wife had retired, and, waking them, asked to be permitted to come into the house and stay until morning. Johnson arose and opened the door, and the person came into the house, and, as Johnson turned to go into an adjoining room to get a lamp which was burning, but turned down low, he

struck him with a club on the head, the blow rendering him unconscious. At this, Mrs. Johnson arose and got the lamp and, turning it up, went with it into the room where her husband was. The person who had come into the house immediately attacked her and struck her a blow with the club, but she seized hold of it and succeeded in taking it from him, when he immediately left the house. Johnson testified that he recognized defendant as the person who spoke to him from the outside of the house, by his voice, and Mrs. Johnson testified that she saw the person who came into the house, by the light of the lamp, and that she knew it was defendant. Both witnesses were permitted, against defendant's objection, to testify that the person, while outside of the house, in answer to the question of Johnson, "Is that you, Kepper?" replied, "You bet."

It is very clear, we think, that the whole of the conversation between Johnson and the person outside of the house was admissible as constituting part of the *res gesta*. It tended to show that Johnson was induced by fraud to open the door of the house and permit the person to enter it. This is not denied by counsel for defendant, but their complaint is that this statement was permitted to go to the jury as evidence to identify defendant as the person who made it.

It is true that the statement was admitted without limitation. The jury were not told that they could not consider it in determining whether defendant was the person who committed the crime.

But, in our opinion, this omission affords defendant no ground of complaint. If this statement had been the only evidence which tended to identify defendant as the person who committed the crime, the jury clearly would not have been warranted in convicting him. But, as stated above, both Johnson and his wife testified that he was the person who entered their house on the night in question. And there are circumstances proven by the testimony of other witnesses, which tend strongly to identify him as the criminal. And,

we think, the fact that the person who committed the crime stated before entering the house that he was Kepper, might properly be considered by the jury, in connection with the other circumstances proven, in determining the question of identity.

III. The court permitted the state to introduce evidence tending to prove that defendant knew that Johnson had a sum of money in his house at the time the offense was committed. The objection urged against the admission of this testimony is that it is not relevant to any issue in the case. It must be admitted that the evidence did not tend to prove either the breaking and entry of the building, or the intent alleged in the indictment. The averment in the indictment is that the building was broken and entered with intent to commit an assault and battery, and the evidence shows that the person who committed the crime went into the building armed with a club, and committed an assault and battery on both Johnson and his wife. This shows clearly enough that he had it in mind when he entered the building to commit that crime. But it is not reasonable to presume that this was the only intent with which he entered the house. The circumstances show very clearly, we think, that the principal intent with which the building was entered was to commit the crime of larceny or robbery. The fact, then, that defendant knew that there was money in the house, was a proper circumstance to be considered by the jury in determining whether he is the person who broke and entered it. And when the fact that the particular crime charged in the indictment is proven, evidence which tends to identify the defendant as the person who committed it is relevant to the issue, and is admissible even, though it tends also to prove the commission of a distinct crime from that charged in the indictment, or a different motive from that alleged.

We have found no error in the record on which the judgment ought to be reversed, and it is accordingly

AFFIRMED.

VARNUM V. LEEK.

65	751
102	159

1. **Tenants in Common: RIGHT OF OCCUPANCY: LIABILITY TO ACCOUNT: ACTION IN PARTITION: RECEIVER.** It is the right of a tenant in common to occupy the common property, and such occupancy alone does not render him liable for rent. But if the occupying tenant should refuse to allow his co-tenant to occupy with him, such refusal might be deemed an ouster, and in that case the occupying tenant may be held liable to account. It follows that, where the tenant in possession is occupying under such circumstances that he is not liable to account, such mere occupancy affords no ground for the appointment of a receiver, pending an action for partition.

Appeal from Poweshiek District Court.

WEDNESDAY, APRIL 22.

ACTION for a partition of real estate. The plaintiff, after the action was brought, applied for the appointment of a receiver. The court refused the application. From the order the plaintiff appeals.

Winslow & Varnum, for appellant.

H. F. Garretson and L. C. Blanchard, for appellees.

ADAMS, J.—Whether an appeal lies from a refusal to appoint a receiver, or whether, in case it lies, we should be justified in reversing, in the absence of a showing of abuse of discretion, we need not determine. It appears to us that no proper ground was shown for the appointment of a receiver, and that in no view could the refusal be held to be error. The application for a receiver was submitted upon the pleadings, which consisted of the plaintiff's original petition, the defendant's answer thereto, and the plaintiff's petition for a receiver. In the original petition, the plaintiff averred that he was the owner of an undivided nineteen-twentieths of the land, and the defendant of an undivided one-twentieth. The defendant denied that the plaintiff was the owner of an undi-

vided nineteen-twentieths and averred that he was himself in possession, under a claim of right, and had made valuable and permanent improvements. The plaintiff, in his petition for a receiver, averred that he himself was not in possession, and that the defendant, in his answer, claimed to be in possession, and would, if a receiver should not be appointed, receive and convert to his own use all the rents and profits, and deprive the plaintiff of nineteen-twentieths thereof.

There is no averment that the property has been leased, or that the defendant is collecting rents. The most that we can infer is that the defendant is occupying the property. The plaintiff's theory, indeed, is that the defendant is occupying the property, and he bases his right to a receiver upon the ground that the defendant is occupying and paying nothing for the use, and under such circumstances that he cannot be made to pay for the use. He shows that he seeks the appointment of a receiver as a mode of divesting the defendant of possession, and of making the use of the property available to the plaintiff.

The provision of the Code in respect to the appointment of a receiver is in these words: "On the petition of either party to a civil action or proceeding, wherein he shows that he has a probable right to or interest in any property which is the subject of controversy, and that such property, or its rents or profits, are in danger of being lost, or materially injured or impaired, and on such notice to the adverse party as the court or judge shall prescribe, the court, or, in vacation, the judge thereof, if satisfied that the interest of one or both parties will be thereby promoted, and the substantial rights of neither party unduly infringed, may appoint a receiver," etc. Section 2903.

It is the right of a tenant in common to occupy the common property, and such occupancy alone does not render him liable for rent. Such liability, if it existed, would tend to deter each tenant in common from occupying, and might keep the property vacant. *Austin v. Barrett*, 44 Iowa, 488;

Reynolds v. Wilmeth, 45 Id., 693; *Isreal v. Isreal*, 30 Md., 120. If the occupying tenant should refuse to allow his co-tenant to occupy with him, such refusal might be deemed an ouster; (*Noble v. McFarland*, 51 Ill., 226;) and in case of an ouster the occupying tenant may be held liable to account. *Sears v. Sellew*, 28 Iowa, 501. If, in the case at bar, the defendant is occupying under such circumstances that he is not liable to account, it follows that he has done no wrong, and such mere occupancy does not afford a ground for the appointment of a receiver. If it were otherwise, it would follow that whenever a tenant in common enters upon the common property his co-tenant might have a receiver.

We do not say that there might not be a case where a tenant in common out of possession would be entitled to a receiver. Perhaps he would be if the occupying tenant was occupying under such circumstances that he was liable to account, and was at the same time irresponsible. But no such case is shown, nor is it so claimed in argument.

It is true, the plaintiff, in his petition for a receiver, averred that the defendant would deprive him of his share of the profits. But he averred no fact from which the court could be satisfied that anything would be lost to the plaintiff to which he was legally entitled. The plaintiff himself does not contend that he did. He sought a receiver, as he shows in argument, as a mode of reaching that to which he would not otherwise be legally entitled. It was a device to circumvent the operation of an acknowledged rule of law.

AFFIRMED.

CAPPER V. SIBLEY ET AL.

1. **Circuit Court: PROBATE BUSINESS: MUST BE TRANSACTED WITHIN THE COUNTY.** Under section 2313 of the Code, the circuit court has no authority to hear and determine a matter in probate outside of the county where it belongs, and an order made outside of such county is void. *Casey v. Stewart*, 60 Iowa, 160, and *Rogers v. Loop*, 51 Id., 41, distinguished.
2. **Landlord and Tenant: POSSESSION UNDER VOID LEASE: LIABILITY FOR RENT RESERVED.** A lessee of land for coal-mining purposes, under a lease which is void, is not liable for rent, where he has done no mining, although he may have enjoyed undisturbed possession of the land, so far as necessary for the purpose of prospecting for coal. *Franklin v. Twogood*, 18 Iowa, 515, and *Shawhan v. Long*, 26 Id., 483, distinguished.

Appeal from Mahaska District Court.

WEDNESDAY, APRIL 22.

ACTION upon a coal-mining lease, to recover for rent alleged to be due under the same. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendants appeal.

John F. Lacey, for appellants..

L. C. Blanchard, for appellee.

ADAMS, J.—The lease in question purports to be executed by the plaintiff as “executrix of the estate of John Capper, deceased.” In her petition, she avers that it was executed “by virtue of her authority as executrix of her late husband, deceased, John Capper, and the authority of the circuit court of Mahaska county.” The defendants pleaded a general denial. The plaintiff, for the purpose of proving her authority to execute the lease, was allowed to introduce in evidence, against the defendant’s objection, the record of the circuit court of

1. CIRCUIT
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county.

Mahaska county, showing an order of the court authorizing the executrix to execute the lease, which order appeared from the record to have been made on notice at Montezuma, in Poweshiek county. The defendants assign the admission of this evidence as error.

Whether the will of the plaintiff's testate authorized her to execute a lease of the real estate in question, does not appear. Whether the circuit court of Mahaska county, in the absence of such provision in the will, had jurisdiction to authorize the plaintiff to execute the lease, admits of great doubt; but we need not determine the question. The objection to the evidence, urged by the appellants, is that the record shows that the order was made outside of Mahaska county, and their legal proposition is that the circuit court of Mahaska county cannot sit outside of the county, and that any order made by the court outside is made without jurisdiction, and is void. The plaintiff, as we understand, denies this proposition. She relies upon section 2313 of the Code, which is in these words: "The court shall always be open for the transaction of business, but the hearing of any matter requiring notice shall be had only in term time, or at such time and place as the judge may appoint." Her contention is that under this section the judge may appoint any time and *any place* for holding court.

That the judge was authorized to appoint any time (when any judicial business can be done) for holding court for the purpose of hearing the matter of the application for authority to execute the lease, is undoubtedly true. But we are not able to give the words "any place," as used in the statute, as broad a meaning as the plaintiff would put upon them. The circuit court of a given county cannot, we think, sit outside of the county. It should not, it is true, be regarded as limited in its sittings to the county seat. In *Casey v. Stewart*, 60 Iowa, 160, an order of the circuit court of Linn county was made at a place other than the county seat, and the order was sustained. But the place at which the court

sat was not outside the county. The decision in that case, therefore, does not afford any substantial support to the ruling in question.

It is proper, perhaps, that we should say that in *Rogers v. Loop*, 51 Iowa, 41, it was held by a majority of this court that a justice of the peace had jurisdiction to try and determine a case in a township other than that for which he was elected; but in that case it was stipulated between the parties that he should hold his court where he did, and it was thought that the stipulation had the effect to confer jurisdiction beyond his territory. Whether the circuit court of Mahaska county could, by stipulation or consent of parties, act as a court in another county, we need not determine, as the record shows no such stipulation or consent.

It is said, however, by plaintiff, that it is not material whether she, as executrix, had authority to execute the lease or not, because the defendants have taken possession of the land, so far as it was necessary for mining purposes, and have prospected for coal, and have not thus far been prevented from exercising and enjoying the rights which they supposed that they acquired under the lease. She cites and relies upon *Franklin v. Twogood*, 18 Iowa, 515, and *Shawhan v. Long*, 26 Iowa, 488. In the former case, it was held that where a person executes a mortgage to a supposed corporation, he is estopped from denying the fact of incorporation. In the latter case, it was held that a vendor who sells real estate to an executor, receives the purchase money, and executes a deed in accordance with the terms of the contract, is thereby estopped from claiming, in an action brought against him for rents received after the sale, that the purchase was invalid because made by the executor without being authorized by the county court. But in both cases the party setting up the objection had received the entire consideration. In the case at bar, the coal, if any could be found, was yet to be mined, and probably not without a large previous outlay.

2. LANDLORD
and tenant:
possession
under void
lease: liability
for rent
reserved.

If the lease had no validity, such outlay could not be made with safety. We do not think that the plaintiff can properly say that it is immaterial whether the lease was valid or not.

In our opinion the court erred in allowing the record in question to be introduced, and the judgment must be

REVERSED.

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ABANDONMENT.

See HOMESTEAD, 1, 2, 4.

ABSTRACT.

For rules relating to the preparation and filing of the abstract of the record on appeals to the supreme court, and instances of failure to comply with those rules, and the resulting consequences, see "Appeal" and "Practice in Supreme Court," *passim*.

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1. CLAIM AGAINST COUNTY: ACCEPTANCE OF PART ALLOWED: ACTION FOR RESIDUE: WHEN MAINTAINABLE: RULE STATED AND APPLIED.
See County, 1.

ACKNOWLEDGMENT.

1. OF DEED BEFORE NOTARY PUBLIC: OFFICIAL SIGNATURE NECESSARY.
See Notary Public.

ACTION.

1. FORM OF: WAIVER OF ERROR BY DEFENDANT. Where plaintiff should have sought his remedy by an appeal from the action of the board of equalization, but, instead thereof, he prosecuted his case as an original action, and defendant answered thereto as such, and made no objection to the form of the proceedings, and was defeated in the court below, *held* that it could not for the first time in this court be heard to object to the form of the proceedings. *Babcock v. Twp. Board of Equalization*, 110.
2. ON INJUNCTION BOND: WHEN IT ACCRUES. See Injunction, 4.
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1. OF ABSTRACT ON APPEAL. See Practice in Supreme Court, 9, 10.

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1. RELEASING SWINE FROM DISTRRAINT. See Criminal Law, 24.

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1. TO SUPREME COURT: SUFFICIENCY OF ABSTRACT. An abstract which recites that it is an abstract of all the evidence, and that, within the time fixed by the court, the appellant filed his bill of exceptions, "embracing all the foregoing testimony and record," is sufficient, without stating that the bill of exceptions was properly authenticated when it was filed, for that will be presumed. *Deere & Co. v. Needles*, 101.
2. TO SUPREME COURT: AMOUNT INVOLVED: JURISDICTION THE RULE. In order to deprive this court of the jurisdiction of an appeal, on the ground that the amount involved does not exceed \$100, that fact must affirmatively appear from the pleadings. Code, § 3163. *Babcock v. Twp. Board of Equalization*, 110.
3. TO SUPREME COURT: RECORD. A notice of a claim for an attorney's lien is no part of the record as between plaintiff and defendant, and should not be embodied in the abstract on appeal. *Rogers v. Winch*, 168.

4. **TO SUPREME COURT: NO JURISDICTION WHERE NO JUDGMENT SHOWN.** This court has no jurisdiction to decide questions, even with the consent of parties, where the record fails to show that a judgment was rendered below from which an appeal has been taken. *Warder, Mitchell & Glessner v. Schwartz*, 170.
5. **TO SUPREME COURT: TRIAL DE NOVO: RIGHTS OF PARTY NOT APPEALING.** On appeal to the supreme court, even when the case is triable *de novo*, a party who does not appeal from the judgment below cannot have any more favorable judgment in this court, though it appears from the record that he was entitled to a better judgment in the court below. *Frost v. Parker*, 178.
6. **TO SUPREME COURT: FACTS NOT WARRANTING: ALLOWANCE TO RECEIVER.** Where the court, by agreement of the parties, had made an allowance of compensation to a receiver, but no appeal was taken from the order of allowance, and, more than six months after the order was made, one of the parties moved the court to set aside and vacate the order, which motion the court overruled, *held* that, while the allowance was excessive, yet the remedy for the one aggrieved thereby was by appealing from the order of allowance within the time prescribed by statute, and that no appeal to this court from the order overruling the motion to vacate could be entertained. *Russell v. First Nat. Bank of Red Oak*, 242.
7. **TO SUPREME COURT: AMOUNT IN CONTROVERSY: JURISDICTION.** Where the petition claimed less than \$100, and the answer alleged payment of more than \$100, but did not set up a counter-claim, nor ask judgment against plaintiff for any balance, the amount in controversy was less than \$100; and this court has no jurisdiction to entertain an appeal in such case, without the certificate of the trial judge required by § 3173 of the Code, even though the case was tried below, and is presented in this court, on the theory that the answer did plead a counter-claim. *Kurtz & Bittinger v. Hoffman*, 260.
8. ———: ———: **COUNTER-CLAIM ABANDONED.** In the case above stated, even if it were admitted that the answer pleaded a counter-claim for more than \$100, yet, if defendant failed to support it by any evidence, he thereby abandoned it, and the amount claimed therein could no longer be said to be "in controversy," within the meaning of § 3173 of the Code. *Id.*
9. **TO SUPREME COURT: TRIAL DE NOVO: SUMMARY PROCEEDINGS.** This court has no jurisdiction to try *de novo* a cause prosecuted by summary proceedings. *Brett v. Myers*, 274.
10. **TO SUPREME COURT: CRIMINAL CASE: DEFICIENT RECORD.** The record in this case showing no notice of an appeal, and being otherwise defective, the judgment of conviction for manslaughter cannot be disturbed. *State v. Leslie*, 305.
11. **TO SUPREME COURT: FROM ORDER OF CONTINUANCE.** An appeal does not lie from an order of continuance, it not being a final order. *Jaffray & Co. v. Thompson*, 323.
12. **FROM JUSTICE'S COURT: AMOUNT IN CONTROVERSY: JURISDICTION.** Where plaintiff sued in justice's court for \$40, and judgment was rendered in his favor for \$24, and the defendant appealed, *held* that the amount in controversy was \$40, and not \$24, and that, therefore, the circuit court had jurisdiction to entertain the appeal, under § 3575 of McClain's Statutes, (Laws of 1890, Chapter 163,) and it was error to dismiss it. *Lundak v. Chicago & N. W. R'y Co.*, 473.
13. **FROM JUSTICE'S COURT: JURISDICTION OF CIRCUIT COURT: AMOUNT IN CONTROVERSY.** A cause appealed from a justice's court stands in the

circuit court, as to the amount in controversy, just as it did in the justice's court, (Code, § 3590). So, where the action was for \$24.50, and there was a counter-claim for \$30, and upon trial the only judgment rendered by the justice was against plaintiff for costs, from which he appealed, *held* that the amount in controversy was that shown by the pleadings, and not the amount of the judgment, and that, the amount in controversy being more than \$25, the circuit court had jurisdiction of the appeal, under § 3575 of the Code. *Perry v. Conger & Norris*, 538.

14. TO SUPREME COURT: FROM ORDER DISMISSING PETITION FOR COMMISSION TO ESTABLISH BOUNDARIES. See Boundaries, 1.
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TAX SALE AND DEED, 10, 11.

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1. OF PATENT-RIGHT DEED: PAROL TO SHOW INTENTION OF PARTIES. See Evidence, 20.

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1. OF PROPERTY TAKEN FROM PERSON OF PRISONER: OFFICER'S RIGHT TO SEARCH AND TO RETAIN PROPERTY. An officer making an arrest, or a jailor upon committing a person to jail, may search him, and take from him not only all offensive weapons, but also all other property which might be used by him in effecting an escape. But where the sheriff upon committing the defendant to jail took from his person two watches and some money, which were in no way connected with the crime with which he was charged, and which could not be used as evidence in the prosecution, it was his duty to return them, and while he retained them his possession was that of the prisoner, and they were no more subject to attachment in an action against the prisoner than if they had been in his pockets. *Reifsnnyder v. Lee*, 41 Iowa, 101, distinguished. *Commercial Exchange Bank v. McLeod*, 665.
2. ———: CONSENT OF PRISONER TO SEARCH: FACTS NOT AMOUNTING TO. In such a case, the consent of the prisoner to the search and to the taking of the property by the officer cannot be inferred from the fact that he made no resistance thereto. *Id.*

3. **AUTHORITY OF ATTORNEY TO DIRECT: LIABILITY OF CLIENT FOR TRESPASS.** See Attorney at Law, 3.
4. **OF STOCK OF GOODS: CROSS-ACTION FOR LOSS OF GOOD-WILL: RECOVERY DENIED.** See Contract, 13.
5. **WRIT FROM FEDERAL COURT: TRESPASS IN LEVY: RECOVERY FOR IN STATE COURTS: CONFLICTING DECISIONS.** See Judgment and Decree, 8.
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ATTORNEY AT LAW.

1. **DELEGATION OF AUTHORITY TO ANOTHER ATTORNEY: LIABILITY OF CLIENT FOR COSTS.** Where one employs an attorney to make a collection, and the attorney turns over the business to another attorney, who makes costs in the attempt to collect the claim, *held* that the client is not liable for such costs,—the attorney employed by him having no power to delegate his authority to another. *Antrobus v. Sherman*, 230.
2. **DEFENSE OF PAUPER CRIMINAL: COMPENSATION: RECOVERY OF COUNTY: AFFIDAVIT.** An attorney at law who has defended a pauper criminal, under appointment of the court, is not entitled to the compensation provided by law (Code, § § 3329, 3830) "until he files his affidavit that he has not directly nor indirectly received any compensation for such services from any source." See Code, § 3331. An affidavit attached to the account, as presented to the board of supervisors, that it is just and true, and wholly unpaid, is not sufficient. *Ryce v. Mitchell County*, 447.
3. **AUTHORITY TO ORDER ATTACHMENT: TRESPASS: LIABILITY OF CLIENTS.** Where a petition in attachment was signed by defendants' attorney and sworn to by one of defendants, and the attorney ordered the levy of the writ, and they took judgment against the defendants in attachment and procured an order for the sale of the attached property, and it was sold pursuant to such order, *held* that the authority of the attorney to direct the levy, or a subsequent ratification of his act, must be presumed, and that, if a trespass was committed by such levy, defendants were liable therefor. *Meyer & Bro. v. Gage Bros. & Co.*, 606.

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ATTORNEY'S FEES.

1. **FOR DEFENSE OF PAUPER CRIMINAL: CONDITIONS OF RECOVERY FROM COUNTY.** See Attorney at Law, 2.
2. **HUSBAND MUST PAY FEES OF WIFE'S ATTORNEY IN ACTION FOR DIVORCE, THOUGH DISMISSED.** See Divorce, 2.

BASTARDY.

1. **UNCHASTE CONDUCT AND MOTIVE OF COMPLAINANT: EVIDENCE.** In a bastardy proceeding, especially where the complainant claims to have been ravished, where the only question is that of paternity, and the circumstances are such as not to preclude the possibility that one other than the defendant may be the father of the child, it is proper to show the unchaste conduct of the woman with such other person, and that, on account of such conduct, trouble arose between her and the family of the defendant, thus showing a motive on her part for falsely charging the

defendant; and the questions asked defendant as a witness in this case (see opinion) should, accordingly have been allowed. *State v. Karer*, 53.

2. **EVIDENCE OF PATERNITY OF FORMER BASTARD CHILD.** In an action for bastardy, where the complainant has been guilty of illicit intercourse with a man other than the defendant, it is competent to show such fact as a circumstance to be used in corroboration of the defendant; and this fact may become very important, if it is shown who the other man was, and that his intimacies and opportunities continued until after the child in question was begotten. And so, where the complainant was the mother of another bastard child, born some fourteen months prior to the one in question, it was competent, under the facts of this case, (see opinion,) to ask her, when on the stand, who the father of the first child was. *State v. Woodworth*, 141.

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1. **AUTHENTICATION BEFORE FILING: PRESUMPTION.** See Appeal, 1.
2. **NOT NECESSARY TO MAKE INSTRUCTIONS PART OF RECORD.** See Practice, 4.

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1. **REMEDY FOR ERROR BY.** See Action, 1.

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1. **AWARDING PRINTING TO NEWSPAPERS: IRREGULARITY: INJUNCTION.** A board of supervisors has power to award the printing required under § 307 of the Code to the two newspapers having the largest circulation in the county, at 33½ cents persquare, and to designate two newspapers to do the printing required by § 304, at a rate not exceeding \$1.00 per square. But where all the said printing was awarded to the two newspapers having the largest circulation, at 33½ cents per square, and to two other newspapers, at 29 2-9 cents per square, *held* that the action was, at most, irregular, and that, since the whole expense so incurred was less than the board was authorized to pay for such printing, a tax-payer had no ground on which to maintain an action to enjoin the supervisors from carrying the award into effect. *Sperry v. Kretchner*, 525.

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1. **PETITION FOR COMMISSION TO ESTABLISH: JURISDICTION OF COURT: DISMISSION OF PETITION: APPEAL: RES ADJUDICATA.** Upon the hearing of a petition to appoint a commission to establish a boundary line, under chapter 8, Laws of 1874, (McClain's St., p. 862.) the court has jurisdiction to look into the nature of the controversy, and to dismiss the petition, if the controversy does not appear to be such as to justify the appointment of a commission. From such order of dismission an appeal would lie, but while the order stands it is an adjudication of the matter as between the parties, and bars the plaintiff from maintaining another action against the same defendants for the same purpose. *Smith v. Scoles*, 733.

2. ———: WHAT IT SHOULD STATE: PRACTICE. The petition in such a case should state the facts in dispute sufficiently to enable the court to determine the nature of the controversy. Failing to do so, it would be subject to a motion for a more specific statement. *Id.*
3. COMMISSION TO ESTABLISH: OFFICE OF. Such a commission has its proper place where a boundary, as called for by the deeds under which the parties hold, is to be discovered by the application in the field of the technical knowledge and practice of surveying, and where each party's claim is supposed to be conditioned upon the discovery of the boundary. Where the dispute turns upon some other question of fact, as that of adverse possession, or upon a point of law, a commission should not be appointed. See *Gates v. Brooks*, 59 Iowa, 514. *Id.*
4. DIVISION LINE AGREED ON: TITLE BY ADVERSE POSSESSION. See Title, 2.

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CASES IN IOWA REPORTS OVERRULED.

Bradley v. Kennedy, 2 G. Greene, 231; *Ellis v. Lindley*, 38 Iowa, 461; *Forshee v. Abrams*, 2 Id., 571; *Fountain v. West*, 23 Id., 9. SLANDER: JUSTIFICATION OF WORDS CHARGING CRIME: MEASURE OF PROOF. See Slander.

CATTLE.

1. GRADE OF: HERD-BOOK AS EVIDENCE. See Evidence, 18.

CERTIORARI.

1. WILL NOT LIE TO REVIEW DISCRETIONARY ACTS. Where a board (such as the commissioners of pharmacy) is clothed with power to determine certain facts, its decision cannot be reviewed on *certiorari*, upon the ground that the evidence considered was incompetent or insufficient. *Tiedt v. Carstensen*, 61 Iowa, 334, followed. *Hildreth v. Crauford*, 339.
2. NOT GRANTED WHERE THERE IS REMEDY BY APPEAL. See Intoxicating Liquors, 4.

CHANGE OF VENUE

See VENUE.

CHARACTER.

1. EVIDENCE OF BAD MORAL CHARACTER TO IMPEACH WITNESS: PRACTICE. See Evidence, i, 2.

CHATTEL MORTGAGE.

1. SALE OF CHATTELS BY MORTGAGOR: LIEN ON PROCEEDS OF SALE. S., having mortgaged certain cattle to the defendant, sold them to A., who, by direction of S., gave to plaintiff, to whom S. was indebted, a draft for a part of the purchase-money. Plaintiff deposited the draft in the defendant bank to his own credit, and took therefor the "deposit check" on which this suit is brought for the recovery of the money. The defendant claimed to have a lien upon the money as the proceeds of the sale of the cattle, by reason of his unsatisfied mortgage thereon. *Held* that defendant's position could not be maintained; that its lien followed the cattle themselves, and not the proceeds, and that plaintiff was entitled to recover. *Waters v. Cass County Bank*, 234.
2. HUSBAND TO WIFE: VALIDITY: INSTRUCTION. Where a chattel mortgage made by a husband to his wife (the plaintiff) was assailed by the husband's creditors as being fraudulent, an instruction to the effect that, if the mortgage was executed in good faith, to secure an existing debt, and that if, in taking the mortgage, plaintiff acted with an honest purpose to secure her claim, then she was entitled to recover, *held correct*. *Headington v. Langland*, 276.

3. **POSSESSION UNDER: NOTICE TO ATTACHING CREDITORS: EVIDENCE.** Possession of property under an unrecorded chattel mortgage is notice to subsequent attaching creditors of the mortgagee's interest; and the evidence of such possession in this case (see opinion) was sufficient to sustain the finding of the court. *Jaffray & Co. v. Thompson*, 323.
4. **QUESTION OF PRIORITY UNDER PECULIAR FACTS.** M. held a first mortgage upon chattels, plaintiffs holding a second mortgage. M. sold the property under his mortgage, and it was bid off by W. at the request of the mortgagor, who told W. that he would furnish the money to pay for the property. He did not, however, furnish the money, but C. did, and the property was delivered to C. A few days thereafter the mortgagor paid C. the amount bid for the property, together with the amount of a debt which he owed him, whereupon the property was delivered to the mortgagor. The mortgagor borrowed the money to pay C., and to indemnify defendant as surety on the note given for the borrowed money, made to him a mortgage on the property. *Held* that the legal effect of the transaction was the same as if the mortgagor had borrowed the money and paid off the first mortgage without the intervention of a sale, and that it advanced plaintiffs' mortgage to a first lien, and that defendant's mortgage was inferior thereto. *Kemerer, Lamb & Co. v. Bloom*, 363.
5. **VALIDITY: RETENTION OF PROPERTY BY MORTGAGOR WITH POWER TO SELL.** The uniform holding of this court, (see cases cited in opinion,) that the reservation by the mortgagor of chattels of the right to retain possession of the property, and to sell it in the ordinary course of business, does not render the mortgage fraudulent in law, adhered to. *Meyer & Bro. v. Gage Bros. & Co.*, 606.

CIRCUIT COURT.

1. **PROBATE BUSINESS: MUST BE TRANSACTED WITHIN THE COUNTY.** Under section 2313 of the Code, the circuit court has no authority to hear and determine a matter in probate outside of the county where it belongs, and an order made outside of such county is void. *Casey v. Stewart*, 60 Iowa, 160, and *Rogers v. Loop*, 51 Id., 41, distinguished. *Capper v. Sibley*, 754.
2. **JURISDICTION OF APPEALS FROM JUSTICES' COURTS: AMOUNT IN CONTROVERSY.** See Appeal, 12, 13.
3. **JURISDICTION TO APPOINT ADMINISTRATOR IN CERTAIN CASE.** See Estates of Decedents, 11.
4. **THE COURT, AND NOT THE CLERK, MUST APPROVE GUARDIANS' BONDS: DUTIES OF CLERK IN PROBATE MATTERS.** See Guardian and Ward, 2, 3.

CITIES AND TOWNS.

1. **SEVERANCE OF TERRITORY: FACTS JUSTIFYING: TERMS OF.** Where lands included within the limits of a city are used wholly for cultivation, and are not needed for city purposes, and are not benefited by being within the corporation, they should be severed from the city upon the petition of the owners; and, where the lands have never been liable for municipal taxes, such severance should not be conditioned upon the payment by the owners of any portion of the indebtedness incurred by the city while the lands were attached thereto. *Evans v. City of Council Bluffs*, 238.
2. **COMMON LAW DEDICATION OF STREET: WHAT IS NOT.** There can be no common law dedication of a street to public use without the *animus dedicandi* on the part of the land owner, coupled with use by the public. *Bradstreet v. Dunham*, 248.

3. DUTY AS TO STREETS: INJURY TO TRAVELER FROM EXCAVATION: EVIDENCE. Where a city street has been open for travel its entire width, the city must keep it in a reasonably safe condition from sidewalk to sidewalk, and cannot excuse itself for leaving an unguarded excavation in such street by showing that there was as a matter of fact no travel thereon. *Crystal v. City of Des Moines*, 502.
4. CONTROL OF STREETS BY GENERAL ASSEMBLY. Where the fee of the streets is in the city for the use and benefit of the public, the general assembly has control thereof, and may prescribe the terms and conditions on which the public may use the same. See cases cited. *Sears v. Marshalltown Street R'y Co.*, 742.
5. ORDINANCE REGULATING SPEED OF CARS: TO WHAT PLACES APPLICABLE. See Railroads, 20.
6. HORSE-RAILWAYS IN STREETS: COMPENSATION OF ABUTTING LOT-OWNERS FOR DAMAGES. See Railroads, 26.

CLERK.

1. OF CIRCUIT COURT: DUTIES OF IN RELATION TO GUARDIANSHIPS AND PROBATE MATTERS. See Guardian and Ward, 2, 3.

CODE.

See STATUTES CITED, CONSTRUED, ETC.

COLLEGE.

1. SUBSCRIPTION IN AID OF. See Contract, 2, 3, 4.

COMMISSIONERS OF PHARMACY.

1. ACT CONFERRING POWERS UPON: CONSTITUTIONALITY. The creation of a board of pharmacy, with the powers conferred thereon by chapter 75, Acts of Eighteenth General Assembly, is not void, as being an attempt to delegate the powers which the constitution vests only in the legislature. *Hildreth v. Crawford*, 339.
2. REVOCATION OF LICENSE BY: DUE PROCESS OF LAW. Plaintiff's certificate as a pharmacist was revoked, and his name stricken from the register, by the commissioners of pharmacy, upon the record proof of his conviction by a competent tribunal of the unlawful sale of intoxicating liquors. Held that he could not complain that he was deprived of his property without due process of law. *Id.*

COMPOUNDING FELONY.

1. ACTS NOT AMOUNTING TO. See Contracts, 1.
2. EVIDENCE NECESSARY TO ESTABLISH. See Criminal Law, 3.

CONDITION.

1. OF SUBSCRIPTION TO COLLEGE: FAILURE OF: EVIDENCE. See Contract, 4.

CONSIDERATION.

1. ILLEGAL: COMPOUNDING FELONY: WHAT IS NOT. See Contract, 1.
2. FOR SUBSCRIPTION IN AID OF COLLEGE: WHAT SUFFICIENT. See Contract, 3.

3. FOR AGREEMENT TO ABANDON PROCEEDINGS TO ESTABLISH HIGHWAY: VOID AS AGAINST PUBLIC POLICY. See Contract, 5.
4. FOR AGREEMENT TO CONNIVE AT THE BREAKING OF A WILL: VOID AS AGAINST PUBLIC POLICY. See Contract, 9.
5. FOR DEED FOR RIGHT OF WAY: WHAT INCLUDED IN. See Railroads, 22.
6. FOR PROMISE TO PAY ANOTHER'S DEBT. See Statute of Frauds, 2.

CONSPIRACY.

See Equity, 1.

INJUNCTION, 2.

CONSTITUTION.

See CONSTITUTIONAL LAW.

STATUTES CITED, CONSTRUED, ETC., at end.

CONSTITUTIONAL LAW.

1. RIGHT TO JURY TRIAL: TAKING LAND FOR HIGHWAY. One jury trial is all that is guarantied by the constitution, and where such trial can be secured by appeal to the district or circuit court, and a party fails to appeal, he thereby waives his right to such a trial. (*State v. Beneke*, 9 Iowa, 203; *Zelle v. McHenry*, 51 Id., 573.) The rule in this case applied to the action of the board of supervisors in refusing to allow damages to a claimant in the establishment of a highway. *Tharp v. Witham*, 566.
2. TAKING PRIVATE PROPERTY: COMPENSATION: WAIVER OF RIGHT. Compensation for property taken for public purposes is guarantied by the constitution only where the owner pursues the usual and ordinary forms and remedies provided by law to obtain such compensation. By failing to avail himself of such remedies, he waives the right. *Id.*
3. TAXATION: DUE PROCESS OF LAW: RIGHT TO NOTICE AND HEARING: RULE APPLIED. Property taken for the non-payment of taxes is not taken without due process of law, if the tax-payer is afforded an opportunity to be heard in relation to the tax, though it be only before the officers clothed with the power to assess, and not before the courts. Whether or not the property-owner is entitled to notice and a right to be heard in all cases is not decided, (but see *Gatch v. City of Des Moines*, 63 Iowa, 718,) but held that a statute or ordinance which provides for an assessment according to benefits, so that, in making the assessment, an opinion is to be formed and discretion exercised by the assessors, but which fails to provide for notice to property-owners, and an opportunity for them to be heard, is unconstitutional, and that the collection of a tax assessed and levied under such statute or ordinance should be enjoined. Compare *Auer v. City of Dubuque*, post, p. 650. *Trustees of Griswold College v. City of Davenport*, 633.
4. REFERENCE OF CAUSE INVOLVING MUTUAL ACCOUNTS: CLAIM AGAINST ESTATE: RIGHT OF TRIAL BY JURY: EQUITABLE JURISDICTION. When there is great perplexity in the accounts between the parties to an action for the establishment of a claim against an estate, and an examination of the accounts by a jury is impracticable, the cause is a proper one for equitable cognizance, and, under § 2816 of the Code, the court may, on its own motion, refer such a case to a referee to report the testimony, the facts found, and the conclusions of law; and, as § 9 of article 1 of the constitution does not guarantee a right of trial by jury in causes of equitable cognizance, that guaranty is not violated by such reference. *Burt v. Harrah*, Adm'r, 643.

5. **TAXATION: RIGHT TO NOTICE AND HEARING: DUE PROCESS OF LAW.** If there is or can be any ground upon which a tax can be upheld which has been levied without notice to the taxpayer, and without an opportunity to be heard, it is incumbent upon the party claiming its validity to show that a notice would have been unavailing, on account of the want of discretion in the persons clothed with the power to make the assessment and levy, or for some other reason; and, as such showing has not been made in this case, the tax must be declared invalid. Compare *Gatch v. City of Des Moines*, 63 Iowa, 718, and *Trustees of Griswold College v. City of Davenport*, ante, p. 633. *Auer v. City of Dubuque*, 650.
6. **DELEGATION OF LEGISLATIVE POWER: THE "PHARMACY ACT" (Chap. 75; Laws of 1880) HELD CONSTITUTIONAL.** See Commissioners of Pharmacy, 1.
7. **DUE PROCESS OF LAW: REVOCATION OF PHARMACIST'S LICENSE.** See Commissioners of Pharmacy, 2.
8. **WAIVER OF RIGHT TO BE CONFRONTED WITH STATE'S WITNESSES.** See Criminal Law, 27.
9. **CHAP. 143, LAWS OF 1884, FOR THE ENJOINING OF SALOONS AS NUISANCES, HELD CONSTITUTIONAL.** See Intoxicating Liquors, 1.
10. **CONSTITUTIONAL QUESTIONS CONSIDERED WITH RELUCTANCE.** See Practice in Supreme Court, 16.
11. **SPECIAL LEGISLATION: CODE, § 1309, HELD CONSTITUTIONAL.** See Railroads, 17.

CONSTRUCTION.

1. **OF CONTRACT FOR DISSOLUTION OF PARTNERSHIP.** See Contract, 6.
2. **OF CONTRACTS: SITUATION AND CONDUCT OF PARTIES CONSIDERED: RULE STATED AND APPLIED.** See Contract, 8.
3. **OF WILL: LIFE ESTATE OR FEE-SIMPLE.** See Will, 1.

CONTEMPT.

1. **OF JUSTICE OF PEACE: REFUSAL TO MAKE AFFIDAVIT.** See Habeas Corpus, 2.

CONTINUANCE.

1. **FACTS NOT ENTITLING TO: SICKNESS OF ATTORNEY: SURPRISE.** A third continuance of this cause was asked in the court below on the ground of the sickness of one of the attorneys, and of surprise by an amendment to the pleadings, but the court overruled the application. *Held*, in view of the facts, (see opinion,) that the court did not abuse its discretion in the matter, and that its ruling should stand. *Rosecranes v. Iowa & Minnesota Tel. Co.*, 444.
2. **ORDER GRANTING NOT APPEALABLE.** See Appeal, 11.
3. **ON MOTION OF STATE ON ACCOUNT OF ABSENCE OF WITNESS: FACTS JUSTIFYING.** See Criminal Law, 5.
4. **ON MOTION OF DEFENDANT ON ACCOUNT OF ABSENCE OF WITNESS: FACTS ENTITLING TO.** See Criminal Law, 25.

CONTRACT.

1. **OF SALE: ILLEGAL CONSIDERATION: COMPOUNDING FELONY: WHAT IS NOT: RETURNING FORGED NOTES UPON PAYMENT.** The holder in good faith of a forged note, received from the forger as collateral security, may lawfully deliver it to the forger upon payment being made by him, and, although such delivery necessarily puts it in the power of the forger to destroy or suppress the paper, and, to that extent, to hinder and prevent his prosecution, and although such necessary consequence must be presumed to be intended by the holder of the paper when he so delivers it, yet such delivery is not the compounding of a felony, within the meaning of §§ 3351, 3352 of the Code. And in this case, where the alleged forger paid the notes by the sale and transfer to the holder thereof of certain personal property, *held* that such sale could not be set aside by an attaching creditor of the alleged forger, on the ground that the consideration thereof was illegal, and that the transaction was, therefore, void, and vested in the transferee no title to the property; and instructions given to the jury in this case, (see opinion,) not in accord with these views, were erroneous. *Deere & Co. v. Wolff*, 32.
2. **SUBSCRIPTION IN AID OF COLLEGE: DEFENSE OF FRAUDULENT REPRESENTATIONS: EVIDENCE.** In an action upon a subscription to the plaintiff university, where the defense is that the subscription was obtained by fraudulent representations, the declarations and statements of plaintiff's president are binding upon it, and are competent evidence of the facts stated by him, so far as they relate to the validity of the subscriptions; but the statements of a mere soliciting agent, made subsequent to the subscription, are not competent on the question of fraud. *University of Des Moines v. Livingston*, 202.
3. ———: **CONSIDERATION FOR: FACTS CONSTITUTING.** A subscription to a college, for the purpose only of discharging a debt already accrued, is without consideration, and void. But where, in consequence of, and relying upon, a subscription, the college incurs expense and trouble in raising other funds for repairs and endowment, there is a sufficient consideration to sustain the subscription. *Id.*
4. ———: **CONDITION: FAILURE OF: EVIDENCE.** Where one of the conditions of a subscription to a college was that an aggregate of more than \$10,000 should be subscribed by a certain time, and \$13,000 was subscribed, but the defense was that subscriptions had been obtained by fraudulent means and representations, and that there was not an aggregate of \$10,000 of *valid* subscriptions, and the evidence offered by defendant showed, at most, but \$1,000 of invalid subscriptions,—since the burden was on defendant to establish the defense, it was to be presumed that the remaining \$12,000 of the subscriptions was valid, and the evidence of the \$1,000 invalid subscriptions, together with the issue to which it related, should have been laid out of the case by a proper instruction. *Id.*
5. **AGAINST PUBLIC POLICY: VOID: INSTANCE.** Proceedings for the establishment of public highways are essentially public in their character, and are for the benefit of the whole people; and while such proceedings are begun voluntarily by private persons, and while, also, such persons may not be compelled to prosecute such proceedings to a final result, yet an agreement to abandon such prosecution, in consideration of money to be paid for such abandonment, is against public policy, and void in law, and cannot be enforced. *Jacobs v. Tobiasson*, 245.
6. **FOR DISSOLUTION OF PARTNERSHIP: CONSTRUCTION OF.** The parties hereto, having been partners in the practice of the law, upon dissolution, entered into a written stipulation, of which the following was a part: "It is further agreed by said parties that if said sum of \$1,182

can be made and collected from said accounts and notes by reasonable diligence, same is to be applied in payment of said sum, and the balance of said accounts and notes to remain the property of Corning and Grohe; the said Grohe to be liable for any balance of said sum remaining unpaid; the said sum being due said Corning upon settlement this day made." The notes and accounts referred to belonged to the firm at the time of dissolution. *Held* that, in view of all the facts and circumstances, the plain language of the contract should be followed, to the effect that the *whole* of the proceeds of the notes and accounts was to be applied to the payment of the \$1,182, until the same should be paid, and not only such part thereof as corresponded to defendant's interest in them before the contract was made. *Corning & Grohe*, 323.

7. **MISTAKE: REFORMATION.** It is only a mistake of *fact* that entitles a party to the reformation of a contract in equity. A mistake of law does not. *Id.*
8. **RULE OF CONSTRUCTION: SITUATION AND ACTS OF PARTIES: RULE STATED AND APPLIED.** It is always competent, in construing a written contract, to consider the situation of the parties, the subject-matter of the contract, and the acts of the parties under the contract, as showing what the parties understood to be their obligations; and this is no infringement of the rule that the contract cannot be explained or varied by parol. And so, where plaintiff was employed by defendant to drive piles on a railroad between certain points, and plaintiff agreed to "push said driving so as to keep out of the way of the track-layers;" and "to drive on said line until all the piles are driven to" the terminus of the road, and the question arose whether plaintiff had, by virtue of said language in the contract, the *exclusive* right to drive piles on said line, and it was shown that, when he began work, another, to his knowledge, and without objection on his part, began like work at another point on the line, and continued such work over a large portion of the line, and that plaintiff, without objection, accepted help from such other person on the part where he (plaintiff) was engaged, *held* that the contract, construed in the light of these circumstances as indicating the intention of the parties, did not give plaintiff the exclusive right to drive the piles on said line. *Thompson v. Locke*, 429.
9. **TO BREAK A WILL: CONSIDERATION: PUBLIC POLICY.** A contract made by and between the father and grandfather of an infant legatee, on the one side, and an heir at law of the testator, but not a legatee under the will, on the other side, whereby it was agreed that the heir should resist the probate of the will, and that the father and grandfather should not insist upon the probate, and that the heir, in case the will should be set aside, should pay the infant legatee the amount of his legacy, (the object being to defeat the residuary legatee.) was void for want of consideration, and as being against public policy; and, though the will was set aside, and the infant lost his legacy thereby, yet his guardian could not maintain an action therefor against the estate of the heir who resisted the probate of the will,—he having, in the meantime, died. *Gray v. Reynolds*, 461.
10. **ACTION ON: DEFENSE—MISTAKE AS TO SUBJECT-MATTER: NOT AN EQUITABLE ISSUE.** Where the action was for damages upon an alleged written contract, and the defendant, without asking for any affirmative relief, simply alleged facts showing that there was a mutual mistake as to the subject-matter of the contract, *held* that the legal effect of the answer was that the minds of the parties never came together, and that, hence, there was no contract, and that the issue so raised was not an equitable one, and was properly submitted to a jury as in an ordinary action. Had defendant gone farther, and asked for a cancellation of the alleged contract, he would have invoked the equity powers of the court. *Carey v. Gunnison*, 702.

11. ———: ———: INSTRUCTION: MISTAKE AS TO ISSUE. In such case, the only issue raised by the answer was as to the existence of the alleged contract, and an instruction which directed the jury to determine from the evidence what the contract was, was erroneous, not only because there was no issue of that kind, but because, even if there had been, it was virtually allowing the jury to reform the writing. *Id.*
12. VOID FOR MUTUAL MISTAKE: TAKING POSSESSION OF GOODS UNDER: RIGHTS AND LIABILITIES. Where, under such supposed contract, defendant took possession of the goods involved, he was not thereby necessarily estopped from setting up the want of a contract. If the contract was void, his possession would not give him title, and he would be accountable to the plaintiff for the goods. *Id.*
13. VOID SALE OF BUSINESS: RECOVERY FOR DAMAGE TO GOOD WILL: EVIDENCE. Where defendant took possession of a stock of goods and the business relating thereto, under a supposed contract of purchase from plaintiff, which defendant, in an action thereon against him for a part of the purchase price, alleged to be void, which action was aided by an attachment of the goods, *held* that, since, on defendant's theory, he never in fact purchased the stock and business, he was not entitled to recover in a cross action for any loss of good will occasioned by the attachment, and evidence of the value thereof was improperly admitted. *Id.*
14. BY LETTER: WHAT NECESSARY TO CONSTITUTE. To constitute a contract by correspondence, one letter must contain a distinct proposition, and the answer must be an unqualified acceptance. The evidence in this case (see opinion) does not establish such a contract. *Barter & Rule v. Bishop*, 582.
15. CONTRACT IN WRITING: TWO PAPERS CONSIDERED TOGETHER: PAROL TO VARY: RULE APPLIED. See Evidence, 15.
16. AGREEMENT TO BECOME LIABLE FOR ANOTHER'S DEBT: CONSTRUCTION OF: RATIFICATION: STATUTE OF FRAUDS. See Letter of Credit, 1, 2.
17. FOR CONTRACTS IN RELATION TO SALES, see Sale, *passim*.
18. RESCISSION OF DIVISIBLE CONTRACT: WHEN NOT ALLOWED. See Sale, 9, 11.
19. RESCISSION OF CONTRACT FOR GOODS TO BE COMPLETED: FACTS NOT WARRANTING. See Sale, 16.
20. NOT ENFORCEABLE BECAUSE NOT IN WRITING. See Statute of Frauds, 2, 4.
21. PLACE OF CONTRACT AS AFFECTING ITS VALIDITY. See Sale, 3.

CONVEYANCE.

1. DESCRIPTION: STREET AS BOUNDARY: VARIANCE BETWEEN SURVEY AND PLAT. Plaintiff conveyed to defendant a tract of land, bounded on the north by "Buckeye street" in a certain town.—said street being the southern boundary of an addition which plaintiff had made to the town. The street, as actually surveyed and marked by visible monuments, was 60 feet north of the street as shown by the recorded plat of the addition. *Held* that the conveyance entitled defendants to hold possession of the land up to the street as actually surveyed, and, as between the grantor and grantee, it was immaterial whether or not, on account of failure to comply with the law, the plat operated as a statutory dedication of the street. *Bradstreet v. Dunham*, 248.
2. MISTAKE: CONFLICTING CLAIMS: EVIDENCE. Plaintiff's record title to the land in question, being founded upon a mistake in the description of

the land intended to be conveyed, was set aside, and defendant's title quieted, by the decree of the circuit court; and, upon consideration of the evidence, (see opinion,) the decree is affirmed. *Killian v. Greene*, 401.

3. DEFECTIVE DESCRIPTION: NOT AIDED BY AUDITOR'S PLAT BOOK. See Title, 1.

CORPORATIONS.

1. LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS: PURCHASE OF STOCK WITH WORTHLESS PATENT. Where a corporation was organized for the manufacture of a patented article, and the amount of capital stock was \$10,000, all of which was taken by defendants in exchange for their interest in the patent, which proved to be worthless, *held* that defendants were personally liable to the creditors of the corporation to the extent of the stock so taken by them severally, under sections 1082 and 1084 of the Code. *Chisholm Bros. v. Forney*, 333.

COUNTY.

1. CLAIM AGAINST: ACCEPTANCE OF PART ALLOWED: ACTION FOR RESIDUE. Where a claim against a county consists of several items, some of which are allowed in full, and others wholly rejected, by the board of supervisors, and the claimant, with full knowledge of these facts, accepts the sum allowed, he is not thereby precluded from maintaining an action against the county for the residue of his claim. *Wapello Co. v. Sinnaman*, 1 G. Greene, 413, and *Brick v. Plymouth Co.*, 63 Iowa, 462, distinguished. *Wilson v. Palo Alto County*, 18.
2. AWARDED PRINTING TO NEWSPAPERS: IRREGULARITY: INJUNCTION REFUSED. See Board of Supervisors, 1.
3. REIMBURSEMENT FOR SUPPORT OF INSANE PERSON: LIEN ON LAND. See Insane, 1.

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See SUPREME COURT.

CIRCUIT COURT.

CRIMINAL LAW.

1. INFORMATION: CHANGE OF VENUE: STATUTE CONSTRUED. In section 4671 of the Code, relating to changes of venue in criminal cases triable in justices' courts, the clause providing that the justice before whom the cause is commenced shall transmit the papers, etc., "to the next nearest justice in the county against whom none of the *above* objections exist," refers only to the objections enumerated in that section, and not to the objections named in section 4670, which are required to be made by affidavit as a ground for a change of venue. Accordingly, where the defendant included in his affidavit for a change an allegation that he could not obtain justice before the other justice of the same township, he being the next nearest justice, such allegation was properly stricken out on motion, and, there being no legal objection against said next nearest justice, the cause was properly sent to him, and he thereby acquired jurisdiction thereof. *Albertson v. Kriechbaum*, 11.
2. JURISDICTION: INFORMATION OR INDICTMENT: MEASURE OF PENALTY: IMPRISONMENT IN DEFAULT OF FINE AND COSTS: LIQUOR LAW. Where a statute provides that for the violation thereof a fine shall be imposed, and that the convict shall pay the costs of prosecution, and that, in default of such fine and costs, he shall be imprisoned for a certain time,

the imprisonment is no part of the penalty, but only a means of collecting the penalty and costs; and so, where the fine provided does not exceed \$100, the cause may be tried on information in justice's court, under section 11, art. 1, of the constitution, although the time for which the convict may be imprisoned in default of payment of fine and costs may exceed thirty days. Accordingly, a justice of the peace has jurisdiction of the "first offense" contemplated in section 11, Chap. 143, Acts of the Twentieth General Assembly, in relation to keeping and selling intoxicating liquors. *Id.*

3. **COMPOUNDING FELONY: EVIDENCE: FELONY MUST BE ESTABLISHED.** One cannot be directly or collaterally adjudged guilty of compounding a felony, unless it has been established that the other party to the unlawful compact is guilty of the felony. It is not sufficient that he be charged or indicted merely. So *held* in this case, where it was sought to annul a sale on the ground that the consideration thereof was the compounding of a felony, and, therefore, unlawful. *Deere & Co. v. Wolf*, 32.
4. **PROCEDURE: CHANGE OF VENUE: PREJUDICE OF JUDGE: DISCRETION: APPEAL.** Although an application for a change of the place of trial of a criminal case, on the ground of the prejudice of the judge, makes allegations upon which, *if true*, a change should be granted, it does not follow, as a matter of course, that the change must be granted; for the judge may consult his own feelings as well as the papers, and grant or deny the change, as he may think the right demands, in the exercise of a careful discretion; and his ruling will not be reversed on appeal to this court, unless it is made to appear that prejudice in fact existed; and it does not so appear from the record in this case. (See opinion.) *State v. Foley*, 51.
5. **PROCEDURE: ABSENCE OF STATE'S WITNESSES: CONTINUANCE: FACTS JUSTIFYING.** Where defendant was tried for incest, and after the trial the district attorney allowed the state's witnesses to depart, and the jury failed to agree, *held* that the district attorney's failure to hold the witnesses in anticipation of another trial at the same term was not such negligence as should defeat his motion for a continuance, on the ground of the absence of one of the witnesses whose attendance could not be procured at that term. *State v. Miller*, 60.
6. **EVIDENCE: INCEST: WHAT IS CORROBORATIVE.** On a trial for incest, evidence may be corroborative of the prosecutrix, and therefore material, without being in *direct* corroboration of her testimony as to the body of the crime. See opinion for example. *Id.*
7. ———: ———: **FATHER AND DAUGHTER: EVIDENCE TO SUPPORT VERDICT.** The evidence in this case considered, and *held* sufficient to support a verdict that defendant was guilty of incest with his daughter. *Id.*
8. ———: ———: **CORROBORATION: DUTY OF COURT AND JURY.** On a trial for incest, and in like cases, it is for the court to determine whether or not evidence is corroborative, but is it for the jury to weigh and determine the effect of such evidence. *Id.*
9. ———: ———: **IMPROPER INTIMACY.** The mere fact of a man's having given money to the prosecutrix in a case of alleged incest is immaterial as evidence of an improper intimacy between them. *Id.*
10. **EVIDENCE: LARCENY: POSSESSION OF STOLEN GOODS: PRESUMPTION: EVIDENCE TO OVERCOME.** The presumption of guilt arising from the possession of recently stolen property is sufficiently overcome to justify a verdict of acquittal, when the defendant has introduced evidence

explanation of his possession, which raises a reasonable doubt of his guilt. *State v. Richart*, 57 Iowa, 247, followed. *State v. Hopkins*, 240.

11. **NUISANCE: SALOON: INDICTMENT: INSTRUCTIONS: PROOF.** Under section 4091 of the Code, a saloon-keeper who *but once* permits drunkenness, quarreling, fighting, and breaches of the peace to occur in his saloon, to the disturbance of others, is guilty of keeping a nuisance. And so far as the language of the indictment in this case charged a repetition of such disturbances, it was surplusage, and proof of a single disturbance was sufficient to support a verdict of guilty, and an instruction to that effect is approved. *State v. Pierce*, 85.
12. **DRUNKENNESS DEFINED.** A person is drunk in legal sense when he is so far under the influence of intoxicating liquors that his passions are visibly excited or his judgment impaired by the liquor. *Id.*
13. **NUISANCE: SALOON: PLACE OF DISTURBANCE: EVIDENCE.** On the trial of a saloon-keeper for nuisance, the state is not confined to proof of disturbances within the building, but may show that drunkenness, quarreling or fighting occurred at the place, but without the building, if they occurred with defendant's permission, or were occasioned by the business which he was carrying on in the building; (*State v. Webb*, 25 Iowa, 235;) but the fact that liquor sold by him was carried away and consumed elsewhere is immaterial. *Id.*
14. ———: ———: **EVIDENCE.** In such a case, it is competent for the state to show that persons, immediately after leaving defendant's place, appeared to be intoxicated; for such evidence would tend to prove that drunkenness was permitted at such place. *Id.*
15. **REASONABLE DOUBT: INSTRUCTION, CONSIDERED AS A WHOLE, APPROVED.** An instruction is not to be reviewed in detached sentences, but as a whole; and, when so considered, the instruction in this case, (see opinion,) defining a reasonable doubt, and stating the effect thereof, is approved. *Id.*
16. **FALSE PRETENSE AS TO EXISTING FACT: WHAT IS.** Where defendant borrowed money on the false pretense that his brother was to arrive with money for him, coupled with a promise to use it in payment of the sums borrowed, this amounted to a pretense that he had the money, *as an existing fact*, and it was properly alleged in the indictment and proved on the trial. *State v. Fooks*, 196.
17. **OBTAINING MONEY ON FALSE PRETENSE: INFLUENCE OF THE PRETENSE: INDICTMENT.** An indictment for borrowing money upon a false pretense need not allege that the false pretense was the *sole* cause which induced the complainant to loan him money. It is sufficient to allege that it was the *main* cause. *Id.*
18. ———: **PLAUSIBILITY OF PRETENSE.** It is not necessary, in order to sustain a conviction for obtaining money upon a false pretense, that the pretense should be so plausible as to deceive a prudent and intelligent man. It is sufficient to show that it was made with the intention to deceive the victim, and that it did deceive him, though he may have been weak and credulous. *Id.*
19. ———: **EVIDENCE: ADMISSION BY DEFENDANT OF HIS POVERTY.** Where defendant, when arraigned upon an indictment for borrowing money upon the false pretense that he was a man of means, stated to the court that he had no means to employ counsel to defend him, and thereby obtained counsel at the expense of the state, his statements so made were admissible in evidence upon the trial to prove the falsity of the pretense made to his victim. *Id.*

20. ———: EVIDENCE OF DEVICES. On the trial of such a case, it is proper to show the arts and devices used by the accused to lead his victim to rely upon the alleged false pretense. *Id.*
21. SPECIAL VERDICT. There can be no special verdicts in criminal cases. Sections 2806-2809 of the Code, authorizing special findings, relate to civil cases alone. *Id.*
22. PRELIMINARY EXAMINATION: FILING MINUTES WITH CLERK. Section 4289 of the Code does not require the minutes of a preliminary examination to be filed with the clerk of the district court, in a case where the defendant is discharged upon such examination. *State v. Helrin*, 289.
23. ROBBERY: COINS: EVIDENCE OF VALUE. Where the indictment alleged the taking of certain gold and silver coins, and the person robbed testified that he was robbed of \$245 in gold, mostly in twenty-dollar gold pieces, but partly in five and ten-dollar gold pieces, and of \$45 or \$50 in silver dollars, *held* that this was sufficient evidence of the genuineness and value of the coins. *Id.*
24. RELEASING DISTRAINED SWINE. The word "stock," as used in section 2, chapter 188, Acts of the Eighteenth General Assembly, making it a misdemeanor to release distrained stock, has its ordinary meaning as used in agriculture, and includes swine. *State v. Clark*, 336.
25. CONTINUANCE FOR ABSENCE OF WITNESS: FACTS ENTITLING TO. It appearing from the record in this case that the defendant had used due diligence to secure the attendance of a material witness, and had shown reasonable excuse for not at an earlier day making an application for a continuance on account of the absence of such witness, *held*, in view of the circumstances of the case, (see opinion,) that the court erred in overruling his application, and that the judgment of conviction should be reversed. *State v. Stone*, 366.
26. FALSE PRETENSES: FACTS CONSTITUTING. Where defendant obtained property under the false pretense that he had purchased a farm in the neighborhood, *held* that this was a falsehood in regard to an existing fact, and sufficient to sustain a judgment of conviction. *State v. Fooks*, 452.
27. WAIVER BY DEFENDANT OF PRESENCE OF WITNESS. It is competent for a defendant in a criminal case to waive the presence of one of the state's witnesses, and to agree to have his written testimony read to the jury. Compare *State v. Polson*, 29 Iowa, 133. *State v. Carman*, 63 *Id.*, 130, distinguished. *Id.*
28. PRACTICE: AID TO DISTRICT ATTORNEY: EMPLOYMENT OF COUNSEL BY PROSECUTING WITNESS. With the consent of the district attorney, the district court may permit attorneys employed by private parties (the prosecuting witness in this case) to assist in prosecutions;—following *State v. Fitzgerald*, 49 Iowa, 260; and this practice has been so long established in this state as to require an act of the legislature to abrogate it. *State v. Montgomery*, 483.
29. ASSAULT: SEVERAL ACTS IN ONE OFFENSE: EVIDENCE. Where defendant, in seeking to prevent the prosecuting witness from crossing his farm, pointed a cocked revolver at him more than once, *held* that the several acts were but parts of the same transaction, and constituted but one assault, and that, while one act was sufficient to constitute an offense, all were properly shown to establish the *animus* of the defendant. *Id.*
30. EVIDENCE: ANIMUS OF PROSECUTING WITNESS. For the purpose of showing the feeling of the prosecuting witness toward the defendant, it was competent to prove that there had been difficulty between them; but to prove particular acts, such as that the witness had struck defendant, was not competent. *Id.*

31. ———: ASSAULT: INTENTION IN TAKING WEAPON. One charged with committing an assault with a revolver should not be permitted to testify as to his purpose in taking the revolver with him, for, however innocent his purpose, it would not justify an assault with the weapon. *Id.*
32. ASSAULT WITH REVOLVER TO REMOVE TRESPASSER. An assault with a revolver cannot be justified for the purpose of removing a mere trespasser from the premises of the assailant. *Id.*
33. MANSLAUGHTER: EVIDENCE INSUFFICIENT. The evidence in this case being insufficient to connect defendant with the homicide, the judgment of conviction for manslaughter is reversed. *State v. Specht*, 531.
34. RAPE: CORROBORATION OF PROSECUTRIX: EVIDENCE ON APPEAL. Although the evidence contained in the abstract in this case tends very slightly, if at all, to corroborate the prosecutrix in a trial for rape, yet, as the abstract does not purport to contain all the evidence, this court cannot say that she was not corroborated. *State v. Cook*, 560.
35. ———: EVIDENCE OF CONSENT: DECLARATION OF PROSECUTRIX. If the prosecutrix in this case, on the same day when the alleged rape was committed, stated to another woman, who had seen her and the defendant in questionable relations only a few minutes before the commission of the alleged rape, "that she had had sexual intercourse with the defendant, and would have it again, and did not care what other people might say," *held* that such statement should have been allowed to go to the jury as bearing on the question of her consent. *Id.*
36. CHANGE OF VENUE: PREJUDICE OF JUDGE. The statement of the mere belief of the defendant that the judge is prejudiced, when such belief is founded alone on alleged facts, of the existence of which defendant has no personal knowledge, is insufficient to overcome the presumption which arises from the denial which is implied in the order of the judge overruling the petition for a change of venue; but, with the unequivocal statement of the judge that the alleged facts on which the belief of defendant is based have no existence, the question of the correctness of the ruling is not left to depend on the presumption which arises under the law in its favor, but is affirmatively established. *State v. Hale*, 575.
37. EVIDENCE: ARSON: TRACKS OF DEFENDANT'S HORSE. Evidence that certain horse-tracks led from the place where the arson was committed to defendant's barn, and that the tracks corresponded in size to the feet of defendant's horse, *held* insufficient to sustain a verdict of guilty, without other evidence connecting defendant with the crime; and the other evidence offered against defendant in this case (see opinion) was as consistent with his innocence as with his guilt. *State v. Melick*, 614.
38. ———: ———: ———. In such case defendant should have been allowed to show that his horse could not wear a shoe of the size of the track in question. *Id.*
39. ———: CROSS-EXAMINATION: PRACTICE. Where a witness testifies in chief to a conversation, his cross-examination should be confined to the same subject. *Id.*
40. LARCENY: OF MONEY FROM PERSON: SUFFICIENCY OF INDICTMENT. The indictment in this case, charging that the defendants, "on the 16th day of April, 1892, in the county aforesaid, seven \$100 notes, of the value and denomination of \$100 each, consisting of national bank-notes, and national currency called greenbacks, and all of the aggregate value of \$700, then and there being the property of the said A. H. H., feloniously did steal, take and carry away, contrary to law," *held* sufficient. *State v. Graham*, 617.

41. ———: EVIDENCE TO EXPLAIN POSSESSION OF MONEY. Where bills of the denomination of the money stolen were found in the possession of one of the defendants, it was not competent, in explanation of such possession, to show that such defendant had bills of such denomination two or three months before, unless the money then had was shown to be identical with the money had after the larceny. *Id.*
42. APPEAL TO SUPREME COURT: NO JUDGMENT BELOW: NO JURISDICTION. Where the abstract fails to show that a judgment was rendered below, from which an appeal was taken, this court has no jurisdiction, and the appeal must be dismissed. *State v. Wheeler*, 619.
43. WHAT WITNESSES THE STATE MAY EXAMINE ON THE TRIAL. Under chapter 130, Laws of 1880, the grand jury may find an indictment upon the minutes of evidence given by the witnesses before a committing magistrate; and in such case, by section 3 of said chapter, the state is entitled on the trial to examine any witness in support of the indictment who was examined before the committing magistrate, and whose evidence was considered by the grand jury in finding the indictment, and a minute thereof returned to the court with the indictment. But where the indictment was found upon minutes which were not certified by the magistrate, as required by section 4242 of the Code, *held* that the grand jury was not precluded from satisfying themselves by other evidence that the minutes were correct, and that it must be presumed that they did so satisfy themselves; also, that the state did not thereby lose any right to examine the witnesses who testified before the magistrate, which it would have had had the minutes been properly certified. *State v. Kepper*, 745.
44. BURGLARY: EVIDENCE OF IDENTITY: RES GESTÆ. Where the prosecuting witness and his wife both testified that defendant was the person who entered their house on the night in question, and there were other circumstances, proved by the testimony of other witnesses, which tended strongly to identify him as the criminal, the fact that the person who committed the crime stated, before he entered the house, that he was the defendant, was proper to be considered by the jury, in connection with the other circumstances in evidence, in determining the question of identity. *Id.*
45. ———: ———: PROOF OF COMMISSION OF ANOTHER CRIME: RELEVANCY. Where the indictment charged burglary with intent to commit an assault and battery, and the body of the crime was established, it was competent, for the purpose of identifying defendant as the criminal, to show that he knew that there was a sum of money in the house at the time, even though it tended to prove the commission of a distinct crime from that charged in the indictment, or a different motive from that alleged. *Id.*
46. ALLEGATION OF COUNTY: JUDICIAL NOTICE OF LOCATION OF TOWN. An indictment which charged that the crime was committed in the town of L., without naming the county, was not defective, where L. was the county seat of the county where the indictment was found; for the court will take judicial notice of that fact. *Hildreth v. Crawford*, 339.
47. ATTORNEY'S FEES FOR DEFENDING PAUPER: CONDITIONS OF RECOVERY FROM COUNTY. See Attorney at Law, 2.
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2. MEASURE OF: ERRONEOUS INSTRUCTION. An instruction as to the measure of plaintiff's damages in this case not being warranted by the allegations and proof, and it appearing from the verdict that defendants were prejudiced thereby, held that the giving of the instruction was reversible error. *Inman v. Ball*, 543.
3. EXEMPLARY: WHEN TO BE ASSESSED. In order to justify the assessing of exemplary damages, it must be made to appear that the act complained of was a willful or malicious wrong; and an instruction in this case, to the effect that the defendants were liable for exemplary damages, if they, when they committed the acts, had good reason to believe they were wrongful, held erroneous. *Id.*
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DESCRIPTION.

1. OF LAND IN CONVEYANCE: VARIANCE BETWEEN SURVEY AND PLAT: PLAT CONTROLS. See Conveyance, 1.
2. JUDICIAL NOTICE OF LOCATION OF LAND DESCRIBED BY TOWNSHIP AND RANGE. See Tax Sale and Deed, 18.
3. OF PROPERTY IN INSURANCE POLICY: LATENT AMBIGUITY: PAROL TO EXPLAIN. See Insurance, 1.

DILIGENCE.

See RAILROADS, 7, 27.

DISTRICT ATTORNEY.

1. MAY BE AIDED ON TRIAL BY COUNSEL EMPLOYED BY PROSECUTING WITNESS. See Criminal Law, 28.

DIVORCE.

1. CONTRACT FOR ALIMONY: VALIDITY OF: CODE, § 2203. The power of husband and wife to contract with reference to the amount which shall be awarded the wife as alimony, on the dissolution of the marriage relation by divorce, has been recognized by this court in the case of *Blake v. Blake*, 7 Iowa, 46, and subsequent cases; and such power is not taken away by § 2203 of the Code. But courts will, in every case, scrutinize the transaction very closely, and the contract will not be enforced, unless it appears to have been entered into fairly, and to be reasonably just and fair to the wife. *Martin v. Martin*, 255.
2. WIFE AGAINST HUSBAND: DISMISSAL OF ACTION: LIABILITY OF HUSBAND FOR ATTORNEY'S FEES. Where a wife employs an attorney to begin an action for divorce against her husband, and the attorney begins such action in good faith, upon the wife's verified statement of facts which, if true, would entitle her to a divorce, and the action is afterwards dismissed, *held* that the attorney may recover his fees of the husband, without proving that the wife was in fact entitled to a divorce. *Preston v. Johnson*, 285.
3. ON GROUND OF FELONY: DECREE PENDING APPEAL: FORMER ADJUDICATION. Where defendant was convicted of a felony, but appealed, and, pending the appeal, plaintiff began an action against him for divorce on account of such conviction, a decree was properly rendered for defendant, because the action was premature, so long as the conviction was not final; (*Rivers v. Rivers*, 60 Iowa, 378;) but such decree was not a final adjudication of plaintiff's right to a divorce for the cause alleged, and did not estop her from maintaining another action on the same ground after the judgment of conviction was affirmed. *Rivers v. Rivers*, 568.

DOMESTIC RELATIONS.

See HUSBAND AND WIFE.

PARENT AND CHILD.

DIVORCE, 1, 2.

DOWER.

1. CUT OFF BY SALE IN BANKRUPTCY. A sale by an assignee in bankruptcy of the bankrupt's land is a judicial sale thereof within the meaning of section 2440 of the Code, and bars a claim to dower therein by the widow of the bankrupt. Compare *Stidger v. Evans*, 64 Iowa, 91. *Taylor v. Highberger*, 134.

DURESS.

1. DEFINITION: EVIDENCE. Duress is an actual or threatened violence or restraint of a man's person, contrary to law, to compel him to enter into a contract, or to discharge one; and the evidence in this case (see opinion) does not sustain the allegations of duress. *King v. Williams*, 167.

ELECTION.

1. DIVISION OF TOWNSHIP: WHEN DIVISION CONSUMMATED FOR ELECTION PURPOSES. See Township, 1.

EMINENT DOMAIN.

1. LAND FOR HIGHWAY: RIGHT TO COMPENSATION AND JURY TRIAL WAIVED. See Constitutional Law, 1, 2.
2. TAKING LAND FOR RAILWAY PURPOSES. See Railroads, 3, 6, 11.

EQUITY.

1. JURISDICTION: FRAUD AND CONSPIRACY: INJUNCTION. Equity will grant an injunction to defeat a fraudulent conspiracy, wherein a deed is sought to be defeated on the false claim that it was forged, and is therefore void; and in such case it will not be particular to inquire whether the conspiracy might not be defeated by some other remedy. *Palo Alto Banking, etc., Co. v. Mahar*, 74.
2. PRACTICE IN: RELIEF UNDER GENERAL PRAYER. Where a petition in equity, besides asking for an injunction, makes the broad and general prayer for all equitable relief to which plaintiff is entitled, the court's power to grant relief is as broad and general as the prayer. *Id.*
3. SUIT BY ONE FOR BENEFIT OF MANY: PARTIAL RELIEF: OBJECTION BY DEFENDANTS. It is not for defendants to defeat an action on the ground that the persons for whose benefit plaintiff sues will not obtain full relief therein. *Id.*
4. LIEN ON TWO FUNDS: MARSHALING ASSETS. A creditor who has a lien on two funds cannot be required by another creditor, who has a lien on one of the funds only, to exhaust the other fund first, except where it can be done without injustice to him. *Cutler v. Ammon*, 281.
5. JURISDICTION OF IN CAUSES INVOLVING COMPLICATED ACCOUNTS: CLAIM AGAINST ESTATE: REFERENCE. See Constitutional Law, 4.
6. DOES NOT RELIEVE AGAINST MISTAKES OF LAW. See Contract, 7.

7. MISTAKE AS TO SUBJECT-MATTER OF CONTRACT: RELIEF IN EQUITY. See Contract, 10.
8. JURISDICTION TO RESTRAIN NUISANCES. See Intoxicating Liquors, 1.
9. EQUITABLE AID: CASES NOT CALLING FOR. See Judgment and Decree, 1, 2, 5.
10. EQUITABLE RELIEF AGAINST FINAL SETTLEMENT OF ADMINISTRATOR. See Estates of Decedents, 8.

ERROR WITHOUT PREJUDICE.

1. NO GROUND FOR REVERSAL ON APPEAL. See Practice in Supreme Court, 11, 15, 17; Evidence, 10, 14; Pleading, 3.

ESTATES OF DECEDENTS.

1. TITLE TO PROPERTY. No action can be maintained by the heirs of a decedent upon a promissory note, the property of the decedent at the time of his death, when the time for granting letters of administration has not expired. Such note belongs to the estate, and not to the heirs. *Haynes v. Harris*, 53 Iowa, 516, followed; *Phinny v. Warren*, 52 Id., 332, distinguished. *Baird v. Brooks*, 40.
2. DEVISEE DYING BEFORE TESTATOR: WHO ARE HEIRS OF: CODE, §§ 2337, 2454. Where a devisee dies before the testator, leaving a widow and a brother, the brother is, but the widow is not, an heir of the devisee, within the meaning of section 2337 of the Code, and in such case the legacy goes to the brother. *McMenomy v. McMenomy*, 22 Iowa, 144, and *Will of Overdieck*, 59 Id., 244, distinguished. And held, further, *arguendo*, that the word "heirs," as used in sections 2337 and 2454 of the Code, has the same meaning. *Blackman v. Wadsworth*, 83.
3. DISCOVERY OF ASSETS: EVIDENCE. See opinion. *Williams v. Thomas*, 183.
4. ADMINISTRATOR'S BOND: WHO MAY SUE ON. Although an administrator's bond, given in 1863, ran to the county judge and his successors in office, it was intended for the security of all persons who might be interested in the administration of the estate, and under Code, § 2552, (Rev. § 2787,) any such person might maintain an action thereon. In this case, held that, after the removal of the administratrix who gave the bond, her successor might sue thereon for assets of the estate remaining in her hands. *Stewart v. Phenice*, 475.
5. POWERS OF SUBSTITUTED ADMINISTRATOR. Under sections 2348, 2349 of the Code, a substituted administrator succeeds to the duties and obligations as well as to the powers of the first administrator. *Shawhan v. Loffer*, 24 Iowa, 217, followed. *Id.*
6. REMOVAL OF ADMINISTRATOR: RIGHT OF SUCCESSOR TO SUE ON BOND: RULE STATED. When an administrator is removed, and he retains in his hands funds of the estate which he fails to pay to his successor, and the debts of the estate, if any, have all been liquidated, then it would seem that the creditors and heirs or legatees are the only persons interested in the funds retained by the first administrator, and that they alone, and not the second administrator, can maintain an action therefor on the bond of the first administrator. But where, as in this case, the first administratrix failed to give notice of her appointment, and she was afterwards removed, retaining funds in her hands, it could not be said whether there were or were not debts owing by the estate, since creditors, if any, had had no notice to file their claims; and it being, in such case, the duty of her successor to give such notice, and to pay the

debts, if any, it was his right to have for that purpose the money retained by his predecessor, and he was entitled to recover the same in an action against her and the sureties on her bond. *Kelley v. Mann*, 56 Iowa, 625, distinguished. *Id.*

7. FINAL SETTLEMENT AND DISCHARGE: NOTICE NOT NECESSARY. There is no provision of statute requiring notice to be given of an administrator's final report and application for discharge, and an order of discharge may be made without notice to persons interested, and, when made, it will have the force and effect of a judgment, and cannot be attacked in a collateral proceeding, but may be amended or set aside for any sufficient cause by a timely and proper proceeding. *Arnold et al. v. Spales et al.*, 570.
8. SETTING ASIDE FINAL REPORT AND ORDER OF DISCHARGE; FACTS WARRANTING EQUITABLE RELIEF. In this case, an administrator, upon notice published in a newspaper of the county, but without actual notice to the plaintiffs, (heirs,) who resided in the county, obtained an order of the court approving his final report and discharging him. *Held* that, after a lapse of two years, upon a showing that, by mistake or fraud, he had failed to report as to a certain fund and to charge himself therewith, the order was properly set aside, under section 2474 of the Code, in a suit in equity by the heirs against him and his bondsmen, and judgment rendered against them in favor of each of them for his distributive share of the fund not accounted for. The provision of section 2475 of the Code, requiring proceedings to open such accounts to be begun within three months, does not apply to cases of mistake or fraud. *Id.*
9. DISTURBANCE OF GIFT TO PAY EXPENSES OF ADMINISTRATION. A gift made by the decedent in his life-time will not be disturbed and charged with the expenses of administering the estate, unless it be such expenses as may be incurred in setting aside the gift for some lawful purpose. *Willett v. Malli*, 675.
10. ALLOWANCE OF CLAIM: HOW FAR BINDING UPON HEIRS AND GRANTEES OF DECEDENT. The allowance of a claim against an estate in an action to which the heirs are not made parties is *prima facie* evidence, as against them, of the correctness and validity of the claim, in a proceeding to subject the real estate which they have inherited to its payment; but it is not conclusive. And such allowance is not even *prima facie* evidence against the heirs in a proceeding to subject real estate to the payment of the claim, on the ground, substantially, that the decedent in his life-time conveyed to them the real estate without consideration, and for the purpose of defrauding creditors; for, as grantees they are in no way represented by the administrator. *Id.*
11. JURISDICTION TO APPOINT ADMINISTRATOR. In any case where an administrator would have a right of action in this state for the collection of a claim, the circuit court has jurisdiction to appoint an administrator to make the collection, no matter where the decedent resided at the time of his death. *Morris v. Chicago, R. I. & P. R'y Co.*, 727.
12. APPOINTMENT OF ADMINISTRATOR: QUALIFICATION BEFORE APPOINTMENT. The appointment of an administrator is not invalidated by the fact that his oath was taken and bond made before his appointment. *Id.*
13. CLAIM AGAINST: COMPLICATED ACCOUNTS: REFERENCE: RIGHT TO JURY TRIAL. See Constitutional Law, 4.

ESTOPPEL.

1. TO DENY CONTRACT OF SALE: TAKING POSSESSION BY MISTAKE. See Contract, 12.

2. OF GARNISHER TO DKNY INDEBTEDNESS: FACTS NOT AMOUNTING TO. See Estoppel, 6.
3. FACTS NOT AMOUNTING TO. See School Districts 2; Tax Sale and Deed, 14.

EVIDENCE.

1. OF BAD MORAL CHARACTER TO IMPEACH WITNESS: REBUTTING. Where the state, for the purpose of impeaching one of defendant's witnesses, had introduced evidence of the general bad moral character of the witness, and the defendant, on cross-examination, had drawn out the fact that the bad reports against the witness were based upon certain suspicions, it was not competent for defendant to go further, and, by evidence in chief, show that such suspicions were without foundation. *State v. Woodworth*, 141.
2. ———: ———. While it is true that evidence of particular immoral acts cannot be given for the purpose of impeaching a witness' general moral character, yet, where there has been evidence that the general reputation of a witness is bad, it cannot be said, as a matter of law, that such proof is insufficient to establish bad moral character, simply because, on cross-examination, it appears that his bad reputation is limited to some particular vice. It is the province of the jury, in such case, to determine the weight and effect to be given to the whole testimony relating to the witness' moral character. *Id.*
3. PRIVILEGED COMMUNICATION: PHYSICIAN AND PATIENT. Where one injured upon a railroad was attended by the company's surgeon, a communication made by him to the surgeon in response to a question asked for the purpose of ascertaining the facts in order properly to treat him, was a privileged communication, within the meaning of section 3643 of the Code. *Raymond v. Burlington, C. R. & N. R'y Co.*, 152.
4. ———: MADE TO PARTNER OF PHYSICIAN. It would violate the spirit of the statute to permit a physician to disclose a privileged communication made in his presence to his partner. *Id.*
5. OUT OF ORDER: RIGHT TO REBUT. Where a point has been gone over in the introduction of evidence, but the plaintiff is permitted afterwards to introduce upon the same point further evidence, which was before omitted by oversight, the defendant should ordinarily have a right to rebut such new evidence. For example, see opinion. *McDonald & Co. v. Moore*, 171.
6. HANDWRITING: CLERK OF COURTS AS EXPERT. A witness does not show himself to be qualified to testify as an expert upon a comparison of handwriting, by stating merely that he is a clerk of the courts, without stating also how long he has served in such office. *Winch v. Norman*, 186.
7. ———: STANDARD OF COMPARISON: HOW ESTABLISHED. Where it is sought to prove, by comparison with another writing as a standard, that a certain writing was executed by the same person who wrote the standard writing, the execution of the standard by such person must be established by direct evidence, and not by comparison with some other writing. *Id.*
8. RECORD OF MORTGAGE. The record of a mortgage is but secondary evidence of its contents, and is not admissible, unless a sufficient reason is given for the non-production of the original writing. *Jaffray & Co. v. Thompson*, 323.
9. IMPROPERLY ADMITTED ON TRIAL OF LAW CASE TO COURT: REVERSIBLE ERROR ON APPEAL. Where improper evidence is admitted in the

trial of an action at law, though the trial be to the court, it must on appeal be deemed to be error, unless the record shows affirmatively that it was afterwards discarded. *Id.*

10. **ERROR IN ADMITTING: NO PREJUDICE: NO REVERSAL.** The admission of improper testimony on a point sufficiently established by other proper testimony can work no prejudice, and is no ground for reversal. *Id.*
11. **SECONDARY: ADMISSION OF WITHOUT OBJECTION: EFFECT OF.** Secondary evidence admitted without objection becomes, in effect, primary evidence. *Id.*
12. **DEPOSITION MAY BE USED BY EITHER PARTY.** Where a deposition was taken by defendants, and other depositions were taken by plaintiff to rebut the testimony given in the deposition taken by defendants, and defendants afterwards gave notice that they would not introduce their deposition, *held* that it was competent for plaintiff, nevertheless, to introduce *all* the depositions, for the purpose of establishing facts material to the issue. *Brown v. Byam*, 374.
13. **SUBORNATION OF PERJURY: INFERENCE AGAINST SUBORNER.** One who procures another to give false testimony in support of a point in issue inferentially admits thereby that he cannot establish the point by truthful testimony. *Id.*
14. **OPINION OF WITNESS: ERROR WITHOUT PREJUDICE.** A question calling for the legal conclusion of the witness should be ruled out; but in this case, where the trial was to the court, and the witness not only answered the question as asked, but proceeded to state all the facts upon which his answer was based, *held* that the error in allowing the question to be answered was without prejudice. *Smalley v. Mores*, 386.
15. **CONTRACT IN WRITING: TWO PAPERS CONSIDERED TOGETHER: PAROL TO VARY: RULE APPLIED.** The written agreement of the parties to a contract is conclusively presumed to be their final agreement, and any parol agreement inconsistent therewith to have been waived. *Barhydt v. Bonney*, 55 Iowa, 717. And so, where two papers are to be considered together as being parts of the same transaction, and as constituting together the agreement of the parties, they must speak for themselves, and the agreement which they together contain cannot be varied by proof of a contemporaneous parol agreement. Where, therefore, defendant conveyed to plaintiff, with covenant against incumbrances, property incumbered with a permanent easement, and plaintiff sued on the covenant for the breach thereof, and the answer set up another writing, as a part of the same transaction, but which contained no limitation of the covenant, and also set up a contemporaneous parol agreement that, in consideration of such writing, the easement was to be excepted from the covenant, *held* that the answer was bad on demurrer, because proof of the parol agreement could not be admitted. *Myers v. Munson*, 423.
16. **OPINIONS AS TO ABILITY TO PERFORM DUTIES OF BAGGAGE-MAN AND EXPRESS MESSENGER.** The opinion of witnesses familiar with the duties of baggage-men and express messengers on a certain route on a railroad, and who had seen plaintiff try to perform those duties, were not admissible to prove his incompetency to perform those duties. No question of science or skill was involved, and it was for the jury, after hearing all the facts, to decide as to plaintiff's competency; following cases cited in opinion. *Moore v. Chicago, B. & Q. R'y Co.*, 505.
17. **SALE: ORDER OF PROOF: STATUTE OF FRAUDS: PRACTICE.** In an action on an oral contract of sale, it was competent to prove the contract, and afterwards to prove delivery under the contract. But where the subsequent testimony of plaintiff tended to show that there was neither

- payment, nor delivery, such testimony was favorable to defendant, as tending to bring the case within the statute of frauds, and he cannot complain that a motion to strike it out was overruled. Such motion was not the proper method of applying the statute of frauds to the case. *Campbell v. Ormsby*, 518.
18. **VALUE OF CATTLE: HERD BOOK.** A printed herd book in which the cattle in question were registered, shown to be a standard authority among cattle-breeders, was competent evidence, under section 3653 of the Code, to show the breed and grade of the cattle. *Kuhns v. Chicago, M. & St. P. R'y Co.*, 528.
 19. **WRITTEN CONTRACT: ORAL TESTIMONY EXCLUDED: ERROR CURED.** Where the court erred in admitting oral testimony of a contract afterwards reduced to writing, *held* that the error was not ground for reversal, where the court afterwards instructed the jury that, if the contract was reduced to writing, no recovery could be had on the oral statements made prior to the writing. *Davis, Gould & Co. v. Danforth & Co.*, 601.
 20. **ASSIGNMENT OF DEED OF PATENT-RIGHT: PAROL TO SHOW INTENTION OF PARTIES.** Where the grantee in a patent-right deed, by a written endorsement thereon, transferred all his rights thereunder to plaintiff, it was competent to show by parol, in a suit of the plaintiff against the grantor, that it was the intention to convey by the assignment not only the right to the patent, but also the right to recover against the grantor for fraudulent representations made in the sale of the right to the grantee. Compare *Moore v. Lowrey*, 25 Iowa, 336, and *Conyngham v. Smith*, 16 Id., 474. *Foster v. Trenary*, 620.
 21. **FRAUDULENT REPRESENTATIONS: SALE OF PATENT-RIGHT: EVIDENCE OF FRAUDULENT DEVICES IN OTHER SALES.** In an action based upon false representations in the sale of a right to a patent device for which certain advantages were claimed, *held* that, if defendant had been compelled, in dealing with others, to resort to fraudulent means for the purpose of making an apparently successful exhibition of the device, evidence thereof was admissible as tending strongly to show that he knew he was making a fraudulent claim for it when he sold to plaintiff. *Id.*
 22. —: —: **EVIDENCE: STATEMENTS MADE IN INTEREST OF VENDOR IN HIS PRESENCE.** In such case, where a third party accompanied the vendor, and made certain statements in the presence of the vendor to the vendee, in relation to the utility of the patented device, *held* that such statements were binding upon the vendor, and were properly admitted in evidence. *Id.*
 23. **ON TRIALS FOR BASTARDY.** See Bastardy, 1, 2.
 24. **DECLARATIONS OF PRESIDENT AND SOLICITING AGENT OF COLLEGE: HOW FAR BINDING ON COLLEGE.** See Contracts, 2.
 25. **FOR EVIDENCE IN SUNDRY CRIMINAL CASES.** See Criminal Law, *passim*.
 26. **CROSS-EXAMINATION AS TO CONVERSATION.** See Criminal Law, 39.
 27. **OF FRAUD IN TRANSFER OF CHATTLES.** See Fraud, 1.
 28. **FOR EVIDENCE AS TO VALIDITY OF CONVEYANCES IN CERTAIN CASES.** See Fraudulent Conveyance.
 29. **HOW FACT OF GARNISHMENT PROVED.** See Garnishment, 1.
 30. **INSURANCE: LATENT AMBIGUITY IN DESCRIPTION: PAROL TO EXPLAIN.** See Insurance, 1.

31. IN ACTIONS ON INSURANCE POLICIES. See Insurance, 1, 2, 6.
32. ORDER OF INTRODUCING: DISCRETION OF COURT. See Practice, 1.
33. FOR REMOVING EVIDENCE TO SUPREME COURT ON APPEAL. See Practice in Supreme Court, *passim*.
34. MEASURE OF PROOF TO JUSTIFY WORDS CHARGING A CRIME, IN ACTION FOR SLANDER: CASES OVERRULED. See Slander.
35. AUDITOR'S PLAT BOOK TO AID DEFECTIVE DESCRIPTION IN DEED. See Title, 1.
36. IN ACTIONS ON TRESPASS. See Trespass, 1, 2.
37. IN ACTION FOR BREACH OF COVENANT. See Vendor and Vendee, 1.
33. PREPONDERANCE OF EVIDENCE. See Instructions, 9.
39. OF CONTRACTS THAT MUST BE IN WRITING. See Statute of Frauds.

EXCEPTIONS.

1. TO INSTRUCTIONS: HOW AND WHEN MADE. Exceptions to instructions, made by appellant in a motion for a new trial on the same day when the verdict was returned, setting forth the grounds of his exceptions, were made in time, and were sufficient, under Code, § 2789. *Deere & Co. v. Needles*, 101.

EXECUTION.

1. EXEMPTION FROM: FOOD PREPARED FOR BOARDERS. Food prepared by a restaurant keeper for his boarders is not exempt from execution. Code, §§ 3072, 3073. *Coffey v. Wilson*, 270.
2. OPPRESSIVE LEVY: WHAT IS NOT. The fact that the food levied upon in this case was intended for special use in providing a meal for plaintiff's boarders, and that it did not sell for as much as it would have brought to plaintiff if used in his business as a restaurant keeper, did not render the levy oppressive in such sense that defendants would be liable therefor. *Id.*
3. SALE WITHOUT NOTICE: STATUTORY PENALTY. Where an officer sells property under execution, without notice, for a sum equal to its value, and applies the proceeds on the execution and costs, and the owner sustains no actual damage by reason of the want of notice, he is not entitled to recover the penalty provided by section 3031 of the Code. *Id.*
4. LEVY UPON AND POSSESSION OF PROPERTY BY DEPUTY SHERIFF: UPON WHOM NOTICE OF CLAIM BY THIRD PERSON TO BE SERVED. Where a deputy sheriff levies an execution upon personal property, and he alone has the actual possession of the property, the notice of ownership by a third person, provided by section 3055 of the Code, may be served on the sheriff,—the deputy being his agent only. *Headington v. Langland*, 276.
5. LEVY ON LEASEHOLD INTEREST IN LAND. See Judgments and Decree, 5

EXECUTOR.

See ESTATES OF DECEDENTS.

EXEMPTION.

1. FROM EXECUTION. See Execution, 1.

2. EXEMPTION LAWS OF OTHER STATES NO DEFENSE IN THIS STATE. See Garnishment, 5.
3. WHAT EXEMPT AS HOMESTEAD. See Homestead, 4.

EXPERT TESTIMONY.

See EVIDENCE, 6, 16.

FALSE PRETENSES.

1. OBTAINING MONEY AND PROPERTY BY. See Criminal Law, 16, 17, 18, 19, 20, 28.

FALSE REPRESENTATIONS.

See FRAUDULENT REPRESENTATIONS.

FOREIGN STATUTES.

1. RIGHT OF ACTION UNDER IN THIS STATE. See Jurisdiction, 3.
2. EXEMPTION LAWS OF OTHER STATES: FORCE OF IN THIS STATE. See Garnishment, 5.

FORFEITURE.

1. OF LICENSE BY PHARMACIST. See Pharmacist, 1, 2, 3; Commissioners of Pharmacy, 2.

FORMER ADJUDICATION.

1. AGAINST GRANTOR: GRANTEE NOT BOUND BY. An adjudication against a grantor of land to the effect that he has no title, in an action begun after he has deeded to another, does not bind those holding under such deed. *Prouty v. Tallman*, 354.
2. PARTIES TO: WHO ARE NOT. The fact that defendants took counsel and contemplated the employment of attorneys to aid the administrator of their father's estate in resisting a claim against the estate, did not make them parties to the proceeding, so as to constitute the allowance of the claim an adjudication binding upon them. *Willett v. Malli*, 675.
3. ORDER DISMISSING PETITION FOR COMMISSION TO ESTABLISH BOUNDARIES BARS SECOND ACTION FOR SAME PURPOSE BETWEEN SAME PARTIES. See Boundaries, 1.
4. FACTS NOT AMOUNTING TO. See Divorce, 3.
5. ALLOWANCE OF CLAIM AGAINST ESTATE: HOW FAR BINDING ON HEIRS AND GRANTEES OF DECEDENT. See Estates of Decedents, 10.
6. JUDGMENT BY DEFAULT: HOW FAR CONCLUSIVE. See Judgment and Decree, 3, 4.
7. PARTIES ONLY BOUND BY JUDGMENT. See Judgment and Decree, 7, 8.
8. MORTGAGEE BOUND BY DECREE ON WHICH MORTGAGOR'S TITLE IS BASED. See Mortgage, 2.

See PUBLIC SCHOOLS, 1.

SCHOOL DISTRICTS, 2.

FRAUD.

1. IN TRANSFER OF CHATTELS: EVIDENCE. Fraud may be established by circumstantial evidence. Accordingly, the fact that F. bought a horse, harness and buggy of N., who was largely indebted, when he (F.) had no use for the property, and the fact that he soon returned the property to N. to be used as his own, were proper to be submitted to the jury upon the question of the good faith of the transaction between them. *Deere & Co. v. Needles*, 101.
2. OF AGENT: INNOCENT PARTIES: WHO TO BEAR LOSS. One who places it within the power of another to commit a fraud must bear the loss, rather than an innocent third party. So where a wife indorsed a paper in blank, and gave it to her husband to enable him to effect a certain purpose, but he fraudulently pledged the paper to an innocent third party to secure a loan, *held* that she could not recover the paper from such party. *Plummer v. Peoples' Nat. Bank*, 405.
3. SALE OF PATENT-RIGHT: FALSE REPRESENTATIONS: DEED PROCURED BY SET ASIDE. The law will not allow one committing a fraud to protect himself by the claim that his victim was easily deceived, and did not act in the matter with reasonable prudence; and so, in this case, where the evidence (see opinion) shows that defendant, by false representations as to the value and utility of a patent-right, and by fraudulent devices in exhibiting it, induced plaintiff, in exchange for an interest in the right, to convey to him his house and lot, *held* that the deed should be set aside. *Gardner v. Trenary*, 646.
4. IN PURCHASE OF GOODS: RESALE TO INNOCENT PARTIES: RECOVERY OF GOODS. See Sale, 7.

FRAUDULENT CONVEYANCE.

1. HUSBAND TO WIFE: EVIDENCE NOT ESTABLISHING. Upon consideration of the evidence in this case, *held* that it is not sufficient to establish that a conveyance from husband to wife was fraudulent as against creditors of the husband. *Ray v. Teabout*, 157.
2. ———: ESTOPPEL: FACTS NOT AMOUNTING TO. Where a wife, long before her husband became indebted, was in the exclusive possession, by her tenants, of a farm, under an unrecorded conveyance from her husband, in which farm she had invested considerable of her own money, which, as between her and her husband, formed a consideration, in part at least, for the conveyance, and the deed was not withheld from record by her with any purpose on her part to aid her husband to incur indebtedness on the strength of the title as it appeared of record, *held* that she was not estopped from asserting her title as against her husband's creditors. *Id.*
3. PLEADING: EVIDENCE. Where defendant's title is attacked on the ground of fraud, he may, under a general denial, introduce any proof showing that his title is not fraudulent. *Id.*
4. TO STRANGERS TO DELAY CREDITORS: KNOWLEDGE OF GRANTEE: EVIDENCE. If it be admitted that the evidence in this case shows a fraudulent intent on the part of the grantor in making certain conveyances of land, it fails to show that the grantees had knowledge of such intent, or participated therein; and the conveyances are therefore sustained as against the creditors of the grantor. *Id.*
5. BROTHER TO BROTHER: EVIDENCE ESTABLISHING. A conveyance by one of the defendants to his brother of his interest in his mother's estate, under the circumstances disclosed by the evidence, (see opinion,) *held* void, as being in fraud of creditors. *Milner v. Davis*, 265.

See VOLUNTARY CONVEYANCE.

FRAUDULENT REPRESENTATIONS.

1. AS TO VALUE OF PROPERTY: EVIDENCE NOT ESTABLISHING. *Williams v. Thomas*, 183.
2. AS DEFENSE TO SUBSCRIPTION IN AID OF COLLEGE: EVIDENCE. See Contract, 2.
3. OBTAINING MONEY AND PROPERTY BY. See Criminal Law, 16, 17, 18, 19, 20, 26.
4. IN SALE OF PATENT-RIGHT. See Evidence, 21, 22; Fraud, 3.

GARNISHMENT.

1. EVIDENCE OF: ADMISSION BY GARNISHEE: INSTRUCTION. One cannot be held as a garnishee unless he has been legally garnished, even though he appear and answer interrogatories; and where, in such case, the garnishee denied the fact of garnishment, the only proper evidence to establish that he had been garnished was the writ and the return thereon; (*Rock v. Singmaster*, 62 Iowa, 511;) and, no such evidence being offered, it was error for the court to give an instruction which assumed that there had been a garnishment. *McDonald & Co. v. Moore*, 171.
2. CONTROVERTING ANSWER OF GARNISHEE: IRRELEVANT ALLEGATIONS. Allegations pleaded to controvert the answers of a garnishee, when they do not tend to establish his liability as such, should be stricken out on motion. For example, see opinion. *Id.*
3. LIABILITY OF GARNISHEE ON ANSWER. A garnishee cannot be held liable upon his answer, unless he therein clearly admits his indebtedness to the principal defendant. *Hibbard, Spencer, Bartlett & Co. v. Everett*, 372.
4. RIGHT TO FEES IN ADVANCE: JUDGMENT AGAINST GARNISHEE FOR REFUSING TO ANSWER. Witnesses, including garnishees, may demand their mileage and their fees for one day's attendance in advance, and, if not so paid, they need not attend, but if they do attend without demanding their mileage in advance, they cannot then, as a condition to testifying, for the first time demand their mileage. And where a garnishee appears and demands mileage and one day's attendance as a condition to answering, and, upon the refusal by plaintiff to comply with such demand, he departs and refuses to answer, the court may rightly render judgment against him to the full extent of the plaintiff's demand. Code, § 2934. Whether he might not, after appearance, be entitled to his fees for one day's attendance before answering, *quaere*. *Stockberger v. Lindsey*, 471.
5. EXEMPTION LAWS OF OTHER STATES. It is the settled rule that in a garnishment proceeding in this state the exemption laws of another state or territory cannot be pleaded or relied on as a defense by either the garnishee or judgment debtor. See cases cited in opinion. *Broadstreet v. Clark*, 670.
6. ESTOPPEL OF GARNISHEE: FACTS NOT AMOUNTING TO. Where the garnishee, before the execution was issued on which he was garnished, stated to the execution plaintiff that he was indebted to the execution defendant, and that he would withhold payment until he could be served with notice of garnishment, thereby inducing plaintiff to sue out an execution and to have a notice of garnishment served, *held* that the garnishee was not thereby estopped from denying that he was indebted to the execution defendant *at the time he was garnished*. His failure to withhold payment, being at most a failure to perform an executory

contract, was no ground for an estoppel, and recovery for such breach, if it were possible, could not be had by proceedings in garnishment. *Starry v. Korab*, 267.

GIFT.

1. FROM ONE DECEASED: NOT DISTURBED TO PAY EXPENSES OF ADMINISTRATION. See *Estates of Decedents*, 9

GRAND JURY.

1. ON WHAT EVIDENCE AN INDICTMENT MAY BE FOUND. See *Criminal Law*, 43.

GUARANTY.

See *PROMISSORY NOTE*, 1.

GUARDIAN AND WARD.

1. ACTION ON BOND: PROCEEDS OF REAL ESTATE. The sureties in an ordinary guardian's bond, required by section 2246 of the Code, are not liable for the wrongs of the guardian in selling his ward's real estate and in squandering the proceeds thereof. Section 2261 of the Code provides a special bond to secure the ward against such wrongs. *Madison Co. v. Johnston*, 51 Iowa, 152, followed, and *Bunce v. Bunce*, 59 Iowa, 533, explained. *Bunce v. Bunce*, 106.
2. GUARDIANS: BONDS OF: MUST BE APPROVED BY THE COURT AND NOT BY THE CLERK: LIABILITY OF CLERK FOR RECEIVING INSUFFICIENT BOND. Although the clerk of the circuit court has power to appoint a guardian in vacation, (Code, § 2315,) he has no power to approve the bond of such guardian. That duty devolves upon the court, (Code, § 2246,) and should be attended to at the next term after the appointment is made by the clerk. Hence, a clerk is not liable in damages upon his bond for failing to demand a sufficient bond of a guardian, or for taking and recording a bond filed by the guardian without a surety. *Reno v. McCully*, 629.
3. ———: ———: DUTY OF CLERK: THE TERM "PROBATE." The duties imposed on the clerk of the circuit court by section 2321 of the Code are limited to "bonds relating to *probate* matters," but the term "probate," when strictly used, relates to the proof of wills, but, in a more extended sense, it relates to the proceedings incident to the administration and settlement of the estates of decedents, and it is so used in the section referred to. But the business pertaining to a guardianship is in no proper sense probate business. *Id.*

HABEAS CORPUS.

1. PRISONER AGAINST SHERIFF: AGREED RECORD INCOMPETENT. Where a prisoner is held to answer to the grand jury, and he claims that the evidence on which he was committed is insufficient in law, and on such ground sues out a writ of *habeas corpus*, it is not competent for him and the sheriff to agree, in the petition and answer, as to what the evidence was; and on such showing the plaintiff herein was properly remanded to the sheriff's custody. *State v. Rosencrans*, 382.
2. CONTEMPT OF JUSTICE OF PEACE: REFUSAL TO MAKE AFFIDAVIT: CODE, § 3962, 3963. Under § 3962, 3963 of the Code, a person is not bound to make an affidavit which is sought only as information on which to base a civil action; and in this case, where plaintiffs were committed by

a justice of the peace for refusing to obey a subpoena, commanding them to appear before him to make an affidavit for such a purpose, they should have been discharged upon *habeas corpus*. *Robb v. McDonald*, 29 Iowa, 330, and *State v. Seaton*, 61 Id., 563, distinguished. *Dudley v. McCord*, 671.

HANDWRITING.

1. **PROOF OF.** See Evidence, 6, 7.

HEIRS.

1. **OF DEVISEE DYING BEFORE TESTATOR: WHO ARE: CODE, § § 2337, 2454.** See Estates of Decedents, 2.

HIGHWAY.

1. **INJUNCTION TO RESTRAIN OPENING OF: DAMAGES FOR OPENING WITHOUT NOTICE.** In an action to enjoin the opening of a highway because not legally established, damages cannot be recovered for opening it without legal notice. *Tharp v. Witham*, 566.
2. **PROCEEDINGS TO ESTABLISH** are in the interest of the public, and a promise to pay money for the abandonment of such proceedings is against public policy, and cannot be enforced. *Jacobs v. Tobiason*, 245.

HOMESTEAD.

1. **ABANDONMENT: FACTS NOT CONSTITUTING.** The evidence in this case considered, (see opinion,) and *held* not sufficient to establish the abandonment by plaintiffs of their homestead. *Shirland v. First Nat. Bank of Massilon*, 96.
2. **CONVEYANCE TO STRANGER AND BY HIM TO WIFE: ABANDONMENT.** The conveyance by a husband of his homestead to a stranger, who afterwards reconveys to the wife, must, in the absence of evidence that the purpose was simply to vest the title in the wife, be regarded as an abandonment of the homestead by the husband, although he does not cease to occupy it. *Jones v. Currier*, 533.
3. **LIABILITY FOR PRIOR DEBT: BURDEN OF PROOF.** A debt contracted prior to the acquisition of a homestead will be enforced against the homestead, unless the owner affirmatively establishes facts which show that it is exempt from such debt. *Paine v. Means*, 547.
4. **EXEMPTION: FIRST FLOOR OF DWELLING USED AS GROCERY: ABANDONMENT: INTENTION TO REOCCUPY.** Where the head of a family for a while occupied both floors of a building as his dwelling, but afterwards used the lower or first floor for the purpose of a grocery store carried on by himself, while the family occupied the second floor as their dwelling, *held* that the first floor, being worth less than \$300, was all the time exempt as a part of the homestead, within the meaning and spirit of § 1997 of the Code; and the fact that, after he went out of the grocery business, he did not for a while actually use the first floor for any purpose, though it was his intention to again occupy it with his family, did not make it liable for his debts. *Rhodes v. McCormack*, 4 Iowa, 368, and *Mayfield v. Maasden*, 59 Id., 517, distinguished. *Smith v. Quiggans*, 637.

HUSBAND AND WIFE.

1. **FAMILY EXPENSE: COST OF ORGAN: JUDGMENT AGAINST HUSBAND ALONE: ASSIGNMENT OF: SUBJECTION OF WIFE'S PROPERTY TO: STATUTE OF LIMITATIONS.** The cost of an organ, though purchased by the

husband for resale, but never actually sold by him, but ever afterwards (for about seven years) used in his family, as organs are ordinarily used, is a family expense, for which the property of the wife is chargeable, under section 2214 of the Code, following *Smedley v. Felt*, 41 Iowa, 588, and other cases cited in opinion. And though the husband gave his individual note for the organ, which was put into judgment against him alone, and the judgment assigned to a third party, the assignee was entitled, upon a showing of the facts in a proper proceeding, to have the wife's property subjected to the payment of the judgment; and such right was not barred by the statute of limitations so long as the debt, in the form which it had assumed, was not barred as against the husband. *Frost v. Parker*, 178.

2. **HUSBAND OF INSANE WIFE: POWER TO DISPOSE OF REAL ESTATE.** The husband of an insane wife has no power to divest her of an interest in real estate. *Thode v. Spofford*, 294.
3. **MORTGAGE OF CHATTELS FROM HUSBAND TO WIFE SUSTAINED AS AGAINST HIS CREDITORS.** See Chattel Mortgage, 2.
4. **LIABILITY OF HUSBAND FOR WIFE'S ATTORNEY'S FEES IN ACTION FOR DIVORCE.** See Divorce, 2.
5. **VALIDITY OF CONVEYANCE FROM ONE TO THE OTHER.** See Fraudulent Conveyance, 1, 2.

INCEST.

1. **CORROBORATION OF PROSECUTRIX: EVIDENCE: DUTY OF COURT AND JURY.** See Criminal Law, 6, 7, 8, 9.

INDICTMENT.

See CRIMINAL LAW, 11, 16, 17, 40, 43, 46.

INFORMATION.

1. **CHANGE OF VENUE ON: JURISDICTION.** See Criminal Law, 1, 2.

INJUNCTION.

1. **PRACTICE: MOTION TO DISSOLVE: AFFIDAVITS.** Under section 3399 of the Code, where an injunction has been allowed without an opportunity to defendant to show cause against it, defendant may, upon his answer alone, without affidavits, move the judge for its vacation, and in such case the plaintiff may support his petition by affidavits. *Palo Alto Banking, etc., Co. v. Mahar*, 74.
2. **FRAUDULENT CONSPIRACY: PARTIES.** One who is about to receive a conveyance of land, in consummation of a conspiracy to defraud the true owner thereof, is a proper party defendant to an injunction suit to defeat the conspiracy. *Id.*
3. ———: ———: **INNOCENT PUBLIC OFFICER: COSTS.** In such a case it is proper to make the county recorder a party, and to enjoin him from recording the fraudulent conveyance, though no charge of fraud is made against him; but he should not be adjudged to pay any costs. *Id.*
4. **ACTION ON BOND: WHEN IT ACCRUES.** Although a preliminary injunction may be dissolved upon motion before the final hearing upon the merits, an action for damages upon the bond will not lie until after the final hearing; because it may be that on the hearing upon the merits an injunction may yet be ordered, and thus it may appear that, notwithstanding

standing the interlocutory dissolution, the injunction was not wrongfully sued out, and that there is no ground for an action on the bond. *Bank of Monroe v. Gifford*, 648.

5. TO RESTRAIN SALOONS AS NUISANCES. See Intoxicating Liquors, 1.
6. IN AID OF LANDLORD'S ATTACHMENT: WHEN REFUSED. See Landlord and Tenant, 1, 4.
7. TO RESTRAIN CONSUMMATION OF A FRAUD: SUIT BY ONE FOR BENEFIT OF MANY. See Parties to Actions, 1.

INNOCENT PURCHASER.

1. OF GOODS OBTAINED BY FRAUD. See Sale, 7; Fraud, 2.

INSANE.

1. CLAIM OF COUNTY FOR SUPPORT OF: LIEN ON LAND. Under section 1488 of the Revision, and section 1433 of the Code, a county has no lien, without judgment, upon the real estate of an insane person for expense incurred on account of such person in the hospital. *Thode v. Spofford*, 294.
2. THE HUSBAND OF AN INSANE WIFE HAS NO POWER TO DISPOSE OF HER PROPERTY. See Husband and Wife, 2.

INSTRUCTIONS.

1. REPETITION NOT REQUIRED. It is no error for the court to refuse to give a proper instruction asked, when it gives the substance of it in another instruction on its own motion. *Minnesota Linseed Oil Co. v. Montague & Smith*, 67; *Sterens v. Holmes*, 129; *State v. Helcin*, 289.
2. MAY BE IN PRINT. Instructions given to the jury in print sufficiently comply with the statute which directs that they shall be in writing. *State v. Fooks*, 196.
3. FULLNESS OF REQUIRED IN CRIMINAL CASE. The instructions in this case being correct so far as they went, and defendant not having asked for fuller instructions, as it does not appear that he was deprived of a fair trial by their brevity, he cannot demand a reversal on account thereof. *Id.*
4. INSTRUCTIONS AS TO ISSUES: REFERRING JURY TO PLEADINGS: ERROR WITHOUT PREJUDICE. It is not competent for the court to refer the jury to the pleadings to ascertain the issues; (*Bryan v. C., R. I. & P. R'y Co.*, 63 Iowa, 464; *Porter v. Knight*, *Id.*, 365;) but where, as in this case, the court otherwise fully instructed the jury, so that no prejudice could result from the error, it is not ground for a reversal. *Hollis v. State Ins. Co.*, 454.
5. PRACTICE: ASKING INSTRUCTION IS WAIVER OF ERROR IN. Where defendant, before the court instructed the jury, asked a certain instruction to be given, which the court did not give in that form, but gave another instruction to the same effect, *held* that defendant could not, on appeal, be heard to complain that such instruction was erroneous. *Campbell v. Ormsby*, 518.
6. PRACTICE: ARGUMENT TO JURY NOT WARRANTED BY EVIDENCE: INSTRUCTION TO OBIVIATE PREJUDICE. Ordinarily, the refusal to give instructions asked, which are merely in the nature of an answer to arguments of counsel on the other side, is to be commended; but in this case, (for facts see opinion,) the argument complained of had no warrant in

the evidence, and was so calculated to prejudice the appellee that an instruction asked by him to obviate the prejudice should have been given. *State v. McCartney*, 522.

7. **MUST BE SUPPORTED BY EVIDENCE.** An instruction in this case *held* to be erroneous, because thereby the court submitted to the jury for their determination a question of fact material to the case, on which there was no evidence. *Bank of Monroe v. Anderson Bros. Mining & R'y Co.*, 692.
8. **MUST BE PERTINENT TO ISSUES.** Certain instructions asked in this case, being based on a wrong theory of the issues, were properly refused. *Davis, Gould & Co. v. Danforth & Co.*, 601.
9. **EVIDENCE: PREPONDERANCE OF.** Instructions in regard to the preponderance of evidence, which stated that "witnesses are weighed, not counted," *held* correct, when taken all together. *Crowley v. Burlington, C. R. & N. R'y Co.*, 658.
10. **INSTRUCTIONS WHICH SUBMIT QUESTIONS NOT IN ISSUE ARE ERRONEOUS.** See Contract, 11.
11. **EXCEPTIONS TO: HOW AND WHEN MADE.** See Exceptions, 1; Practice, 5.
12. **REVIEWING TESTIMONY IN INSTRUCTIONS.** See Practice, 2.
13. **INSTRUCTIONS ARE PART OF RECORD.** See Practice, 4.

INSURANCE.

1. **ERROR IN DESCRIBING PROPERTY: LATENT AMBIGUITY: RECOVERY ON POLICY WITHOUT REFORMATION.** The property described in the policy and application in this case was a store building and stock of goods "situated on lots 7 and 8, in block 2, in the town of Floris," but the property was actually situated on lots 7 and 8, in block 2, in *Hoisington's addition* to the town of Floris, but there was a block 2, containing lots 7 and 8, in the original town. *Held* that, since the addition was a part of the town, the description in the policy and application might be applied either to the lots in the original town or to those in the addition; that it was not a misdescription, but an ambiguous one, and that the latent ambiguity might be shown by parol in an action by ordinary proceedings, and that it was not necessary to have the error corrected in equity before a recovery could be had on the policy. *Eggleston v. Council Bluffs Ins. Co.*, 308.
2. **LIMITATION BY POLICY OF SUIT THEREON: WAIVER OF LIMITATION: EVIDENCE.** Where defendant pleaded, in bar of an action upon a policy of fire insurance, that the action was not begun within six months from the date of the loss, as provided in the policy, it was proper to allow plaintiff to introduce letters written by the company to her, which tended to show that she had been induced, by the promises and representations of the company, to delay the institution of the suit. *Id.*
3. **ACTION ON POLICY: PROOFS OF LOSS AS CONDITION PRECEDENT: WAIVER BY COMPANY.** The provisions of a policy of fire insurance, requiring written proofs of loss, may be waived by the company, and, where such proofs are necessary to be made sixty days before an action can be maintained on the policy, such action may be begun and maintained sixty days after the date of such waiver. *Id.*
4. ———: ———: **INABILITY TO PROCURE.** Where it is shown that the insured, without any fault or fraud on his part, is unable to procure cer-

tain of the proofs of loss required by a policy of insurance, he may recover without a literal compliance with the provisions of the policy in this respect; for the law will not require an impossible thing. *Id.*

5. **APPLICATION FOR: STATEMENTS BY ASSURED: COMPANY ESTOPPED FROM DENYING: KNOWLEDGE OF AGENT.** Where the statements made in an application for insurance were by the contract made a warranty by the assured, but the company, by its agent, who had authority to take the risk, was on the premises when the application was made, and then viewed the property, and himself filled out the application, writing therein statements which he knew were not true, *held* that the agent's knowledge should be imputed to the company, and that it was estopped from claiming that the representations in the application were not true. *Id.*
6. **EVIDENCE: LETTER NOT BINDING COMPANY.** A letter written to the company by the attorney of the assured, not in response to any communication from the company, but expressing opinions and assuming facts prejudicial to the company, was incompetent as evidence against the company for any purpose. *Id.*
7. **PROVISION AGAINST INCUMBRANCE: BREACH OF: FACTS CONSTITUTING.** Where the property insured was a creamery owned by the plaintiff, but erected on her husband's land, and the policy provided that it should become void in case the insured property was incumbered without the consent of the company, and afterwards plaintiff joined her husband in a mortgage of the land, without reserving the creamery, *held* that the mortgage covered the creamery, and rendered the policy void. *Mallory v. Farmers' Ins. Co.*, 450.
8. **POWER OF ADJUSTER TO WAIVE FORFEITURES.** An adjuster of losses does not, as a matter of law, have authority to bind the company by a waiver of forfeitures; and where his acts, if authorized, would amount to a waiver, it must be shown that they were authorized by the company before it can be held to be bound thereby. *Hollis v. State Ins. Co.*, 454.
9. **WAIVER OF FORFEITURE OF POLICY: FACTS CONSTITUTING.** Where the insured, at the time of the loss, had forfeited his right to recover on the policy, and the company, knowing the facts, continued to treat the contract as of binding force, thereby inducing the insured to act and incur expense in that belief, the company thereby waived the forfeiture. See authorities cited in opinion. *Fitchpatrick v. Hawkeye Ins. Co.*, 53 Iowa, 335, distinguished. *Id.*
10. **LIMITATION OF ACTION ON POLICY: WAIVER OF: FACTS NOT CONSTITUTING.** Where a policy of fire insurance provided that no action should be maintained thereon if begun more than six months after the loss, and the company's adjuster agreed with the assured what the amount of the loss was, and the company proposed to pay that amount on certain conditions, which failed, and the company then, five months before the six months had expired in which the assured could bring this action, notified the assured that it would not pay, *held* that the company did not, by these acts, waive its right to insist that the action should be begun within the six months named in the policy. *Garretson v. Hawkeye Ins. Co.*, 468.

INTOXICATING LIQUORS.

1. **CHAPTER 143, LAWS OF 1884: CONSTITUTIONALITY: SALOONS AS NUISANCES: INJUNCTION BY CITIZEN OF COUNTY: RIGHT TO TRIAL BY JURY: EQUITY JURISDICTION: CIVIL ACTION FOR CRIMINAL OFFENSE: SPECIAL DAMAGE TO PLAINTIFF: INJUNCTION BEFORE CONVICTION.** Under the provisions of § 12, Chapter, 143, Laws of 1884, any citizen of a county where a nuisance is kept, in the form of a place used for the

unlawful sale of intoxicating liquors, may maintain an action in equity to enjoin and abate it; and said act is not repugnant to the constitution, as depriving the defendant of the right of trial by jury, nor as being an attempt by the legislature to enforce a criminal law by a civil action, nor because it authorizes any citizen of the county to maintain the action for injunction without showing that he is especially damaged by the nuisance; and in such cases the court may grant a temporary injunction before the defendant has been convicted criminally for keeping a nuisance. *Littleton v. Fritz*, 488; *Pontius v. Winebrenner*, 591.

2. **WRONGFUL SALE TO HUSBAND: JUDGMENT FOR DAMAGES TO WIFE: ACTION TO ENFORCE JUDGMENT AS LIEN ON LEASED PREMISES: JUDGMENT AS EVIDENCE OF AMOUNT OF LIEN.** Plaintiff had obtained judgment against one W. for wrongfully selling to her husband intoxicating liquors, on property leased of defendant G., and in this action she seeks to have her judgment established and enforced as a lien on the property under the provisions of section 1553 of the Code. To prove the amount for which she should have a lien, she introduced, against G.'s objection, the record of the judgment. *Held* that the record was admissible for the purpose only of proving that he had obtained the judgment, but that it was not admissible as against G., who was not a party thereto, as to the amount to which his property should be subjected. *Buckham v. Grape*, 535.
3. ———: **PRACTICE.** In such cases the property owner should be made a party to the original action, so as to make the judgment binding upon him. *Id.*
4. **ABUSE OF PERMIT TO SELL: REVOCATION BY DISTRICT COURT: JURISDICTION: HOW CAUSE ENTITLED: TRIAL BY JURY: CERTIORARI.** The district court has jurisdiction, under § 1535 of the Code, to revoke a permit granted by the board of supervisors for the sale of intoxicating liquors, upon proof that the holder thereof has sold such liquors for unlawful purposes. Such cause may be prosecuted by the informant in the name of the state, and be heard and determined by the court without a jury, and for error in such proceedings appeal, and not *certiorari*, is the proper remedy. *State v. Schmidt*, 556.
5. ———: ———: **TITLE OF CAUSE: APPEAL BOND: DUTY OF COURT TO FIX.** It is not necessary that such proceeding be brought in the name of the state, as it is not a criminal action, but a special proceeding of a civil nature; and the court is not required in such a case to fix the amount in which the defendant must give bond for an appeal to the supreme court, as is provided when it is desired to supersede the judgment in a criminal action, pending an appeal. *Id.*
6. ———: ———: **APPEAL: CERTIORARI: STAY OF JUDGMENT.** Where it is shown to this court, in an application for *certiorari*, that an appeal has been taken from such an order of revocation, this court will not command the execution of the order to be stayed pending the appeal, for no execution or process is required to carry the revocation into effect, (it being self-executory,) and to stay execution for costs the defendant is at liberty to file a supersedeas bond. (*Jayne v. Drorbaugh*, 63 Iowa, 711.) This court has no power in such case to order that the permit be continued in force, pending an appeal. *Id.*
7. **KEEPING WITH INTENT TO SELL: FIRST OFFENSE UNDER § 11, CHAP. 143, LAWS OF 1834: JURISDICTION OF JUSTICE.** See Criminal Law, 2.
8. **WHAT CONSTITUTES A SALOON A NUISANCE: EVIDENCE: DRUNKENNESS DEFINED.** See Criminal Law, 11, 12, 13, 14.
9. **UNLAWFUL SALE OF BY PHARMACIST: FORFEITURE AND REVOCATION OF LICENSE.** See Pharmacist, 1, 2, 3; Commissioners of Pharmacy, 2.
10. **SALE OF: PLACE OF CONTRACT: CODE, § 1550.** See Sale, 3.

JAILOR.

1. RIGHT TO SEARCH PRISONER AND RETAIN PROPERTY: CONSENT. See Attachment, 1, 2.

JOINDER.

1. OF PARTIES AND CAUSES: FACTS JUSTIFYING. See Railroads, 2.

JUDGES.

1. CHANGE OF BETWEEN SUBMISSION AND DETERMINATION OF CAUSE: JURISDICTION NOT LOST. See Jurisdiction, 2.

JUDGMENT AND DECREE.

1. JUDGMENT: CONCLUSIVENESS OF AS AGAINST COLLATERAL AGREEMENT. A judgment is designed as a finality; and courts are not open for the rendition of apparent judgments, but which are not judgments in fact, because the parties have agreed in advance that they should not be conclusive. Accordingly, in this case, where a surety brought an action against his principal and his co-sureties to recover amounts paid by him in the settlement of claims against his principal, and obtained judgment by default for different amounts against the several defendants. *Held* that the co-sureties could not, in a subsequent action, have the judgments canceled, on the ground that, by an understanding between all the parties, the judgment plaintiff was a trustee for all the other parties, and was entrusted by them to take judgment only for the proper (but undetermined) amounts, but that he had in fact taken judgment for amounts greater than were equitable. *Sutliff v. Brown*, 42.
2. JUDGMENT: CREDIT NOT INDORSED: EQUITABLE RELIEF: PRINCIPAL AND SURETY. Where a surety has obtained judgment against his principal and co-surety for payments made, the co-surety cannot have an accounting in equity with the judgment plaintiff, on the ground merely that the latter has received money which should be applied as a credit on the judgment, for it will be presumed that the judgment plaintiff will indorse the amount before issuing execution, or that, upon payment of the difference, he will cancel the judgment. *Id.*
3. JUDGMENT BY DEFAULT: HOW FAR CONCLUSIVE. A judgment rendered against the defendants in a cause, upon their default, is conclusive upon them as to those rights only which were assailed by the petition, and which they were thus called upon to defend. *Shirland v. The First Nat. Bank of Massilon*, 96.
4. JUDGMENT BY DEFAULT: CONCLUSIVENESS OF: COLLATERAL ATTACK. Where one makes default in answering a petition, and judgment is rendered against him pursuant to the allegations and prayer of the petition, he is bound thereby, and cannot, in an action to set aside the judgment, be granted relief which he might have had in the principal case, had he appeared and made defense thereto. *Ebersole v. Latimer & Inglis*, 164.
5. JUDGMENT: LIEN ON LEASEHOLD: SALE OF LEASEHOLD ON EXECUTION: EQUITABLE AID. A judgment is a lien on the debtor's leasehold interest in land, and it follows the leasehold, though conveyed to other persons; (*First Nat. Bank of Davenport v. Bennett*, 40 Iowa, 537;) and such leasehold may be sold upon execution, after conveyance, without the aid of equity; and an action in equity for that purpose cannot be maintained. *Sweezy v. Jones*, 272.
6. ———: LIEN ON RIGHT TO PURCHASE LAND. The right to purchase land at one's option, at a certain price, is not such an interest in land that a judgment against the holder of the option will be a lien thereon. *Id.*

7. JUDGMENT: FOR DEFENDANT AGAINST CO-DEFENDANT, WITHOUT NOTICE, ON COMPROMISE WITH PLAINTIFF: CO-DEFENDANT NOT BOUND BY COMPROMISE. Where a county sought to subject the property of an insane woman to the payment of expenses incurred in her behalf in the hospital, and made S. a party thereto, on account of his holding a tax title on the land, and he paid the demand of the county, without judgment therefor, in consideration that he might be allowed to have the title quieted in him, as prayed in a cross-bill, of which his co-defendant, the woman, had no notice, *held* that such payment by him was purely voluntary, and that her guardian was under no obligation to reimburse him therefor as a condition of redeeming the land from the tax title. *Thode v. Spofford*, 294.
8. JUDGMENT IN ATTACHMENT IN FEDERAL COURT: ONE NOT A PARTY NOT BOUND BY: TRESPASS IN LEVY: RECOVERY FOR IN STATE COURTS: CONFLICTING DECISIONS. An attachment issued by the federal court, in a cause to which plaintiffs were not parties, was levied upon property on which plaintiffs held a mortgage, valid under the decisions of this court, but invalid under a decision of the federal court from which the writ issued. *Held* that, in an action in the courts of this state by the mortgagees against the attachment plaintiffs, to recover the amount of their interest in the property seized and sold, the decisions of this court as to the validity of the mortgage should prevail, and not the decision of the court issuing the attachment. *Myer & Bro. v. Gage Bros. & Co.*, 606.
9. JUDGMENT BY DEFAULT BEFORE JUSTICE, RENDERED OUT OF TIME: IRREGULAR BUT NOT VOID: REMEDY. See Justices' Courts, 3.
10. JUDGMENT: AUTHORITY OF COURT TO CANCEL ON MOTION. See Practice, 8.
11. JUDGMENT AND VENDOR'S LIEN: PRIORITY. See Vendor's Lien, 1.
12. JUDGMENT AGAINST HUSBAND FOR FAMILY EXPENSE: WIFE'S LIABILITY ON. See Husband and Wife, 1.

JUDICIAL NOTICE.

1. OF LOCATION OF COUNTY SEAT. See Criminal Law, 46.
2. OF JURISDICTION OF NOTARY PUBLIC. See Notary Public, 1.
3. THAT THRESHING MACHINE HAS SOME VALUE. See Sale, 6.
4. OF LOCATION OF CONGRESSIONAL TOWNSHIP. See Tax Sale and Deed, 18.

JUDICIAL SALE.

1. SALE IN BANKRUPTCY IS A JUDICIAL SALE THAT WILL CUT OFF DOWER. See Dower, 1.

See EXECUTION, 1, 3.

JUDGMENT AND DECREE, 5.

JURAT.

1. DESIGNATION OF PERSON SWORN: WHAT IS SUFFICIENT. See Tax Sale and Deed, 21.

JURISDICTION.

1. **OF ACTION BY CROSS-BILL AGAINST CO-DEFENDANT: NOTICE NECESSARY.** Where a defendant sets up a cause of action by cross-bill against his co-defendant, notice of such action must be served upon the co-defendant, in order to give the court jurisdiction to render judgment against him on the cross-bill. Code, § 2663. *Devin v. City of Ottumwa*, 53 Iowa, 461, distinguished. *Thode v. Spofford*, 294.
2. **NOT LOST BY CHANGE OF JUDGES BETWEEN SUBMISSION AND DETERMINATION OF CAUSE.** Where an equity cause was tried and submitted in the circuit court, and taken under advisement by the court, under an agreement that the decree should be entered in vacation, but before the cause was determined, by a division of the circuit, another judge came to preside over the court of that county, to whom the cause was transferred, *held* that the court did not lose jurisdiction of the cause, and that the action of the new judge in considering and determining the case without notice to the parties was at most erroneous, and not void, and that, on appeal from the decree so entered, this court has jurisdiction to try the cause *de novo*. *Hull v. Chicago, B. & P. R'y Co.*, 713.
3. **CAUSE OF ACTION ARISING UNDER LAWS OF ANOTHER STATE: RULE STATED AND APPLIED.** Where a right of action accrues by virtue of a statute of any state, the action may be maintained in the courts of any other state where the statutes relating to the same subject are of a similar import, though they be not precisely the same. Indeed, it would seem to be sufficient if the action be not contrary to the public policy or the law of the state where the suit is brought. Accordingly, where the administrator of the decedent had a right of action in the state of Illinois, under the statutes of that state, on account of the negligence of the defendant, resulting in the death of the decedent, *held* that the action was transitory, and might be prosecuted in this state,—the statutes of the two states relating thereto being substantially the same. Compare *Boyce v. Wabash R'y Co.*, 63 Iowa, 70. *Morris v. Chicago, R. I. & P. R'y Co.*, 727.
4. **OF SUPREME COURT.** See Supreme Court.
5. **OF CIRCUIT COURT OF APPEALS FROM JUSTICES: AMOUNT IN CONTROVERSY.** See Appeal, 12, 13.
6. **OF DISTRICT COURT ON PETITION FOR COMMISSION TO ESTABLISH BOUNDARIES.** See Boundaries, 1.
7. **OF CIRCUIT COURT TO MAKE ORDER IN PROBATE OUTSIDE OF COUNTY.** See Circuit Court, 1.
8. **OF COURTS OF EQUITY AS SUCH.** See Equity, 1, 5, 6, 7, 8.
9. **OF JUSTICES OF THE PEACE.** See Justices' Courts.
10. **TO HEAR MOTION IN VACATION.** See Practice, 11.

JUROR.

1. **MISCONDUCT OF.** See New Trial, 3.

JURY.

1. **DEMAND FOR IN JUSTICE'S COURT: WHEN TO BE MADE.** See Justices' Courts, 2.
2. **MISCONDUCT OF JUROR IN DISCUSSING CAUSE OUT OF COURT.** See New Trial, 3.

JUSTICE OF PEACE.

1. POWER TO COMPEL MAKING OF AFFIDAVIT UNDER CODE, §§ 3962, 3963: EXTENT OF POWER: PUNISHMENT FOR CONTEMPT. See Habeas Corpus, 2.

See JUSTICES' COURTS.

JUSTICES' COURTS.

1. JURISDICTION: MORE THAN \$100: CONSENT: RECORD: EVIDENCE. A judgment rendered by a justice of the peace for more than \$100 is valid, provided the parties, as a matter of fact, have consented to his jurisdiction in the case, notwithstanding he fails to make such consent a matter of record. Compare *Bridges v. Arnold*, 37 Iowa, 221. *Schlieman v. Webber*, 114.
2. PRACTICE: DEMAND FOR JURY: WHEN TO BE MADE. In an action in justice's court, if either party desires a jury, demand must be made therefor "at or before the time for joining issue." Code, § 3537. And, although defendant appeared and filed an answer within 15 minutes after the hour at which the notice was returnable, yet plaintiff was not required to give any attention to the case until one hour after the return hour; (Code, § 3525;) and "the time for joining issue" did not expire until he had a reasonable time, after appearing within the hour, to examine the answer, and determine what course he would pursue in relation thereto; and a demand for a jury within such reasonable time, to try the issue raised by the answer, was not too late, though made more than an hour after the return hour. Where the hour for appearance has been extended by agreement, the time for joining issue will be correspondingly extended. *Hall v. Chicago, B. & Q. R'y Co.*, 258.
3. JUDGMENT BY DEFAULT RENDERED OUT OF TIME: IRREGULAR BUT NOT VOID: REMEDY: INJUNCTION. A cause was regularly commenced in justice's court by service of notice on defendant, and was set for 9 o'clock A. M. Plaintiff appeared soon after 9 o'clock, and, before 10 o'clock, defendant not having appeared, the justice stated that, as there was no appearance for defendant, he would enter judgment for plaintiff by default on the itemized and verified account sued on; and he began to make the entry, but, desiring to leave town, he closed his docket, without completing the entry, stating that he would do what further was necessary on his return in the afternoon. Before 10 o'clock the defendant appeared, examined the docket, found no judgment entered and the justice gone, and after 10 o'clock he departed, and gave the case no further attention. At 3 o'clock P. M. of the same day the justice returned and completed the judgment entry. Execution was issued, and this action was to enjoin its enforcement. *Held* that the judgment was irregular, but not void, and that the remedy was by appeal or writ of error, and that injunction would not lie to restrain the enforcement of the judgment. *Central Iowa R'y Co. v. Piersol*, 498.
4. APPEAL TO CIRCUIT COURT: AMOUNT IN CONTROVERSY. See Appeal, 12, 13.
5. CHANGE OF VENUE IN CRIMINAL CASE: AFFIDAVIT FOR: CODE, § 4671, CONSTRUED. See Criminal Law, 1.
6. CRIMINAL JURISDICTION AS GOVERNED BY PENALTY: IMPRISONMENT FOR DEFAULT OF PAYMENT OF FINE AND COSTS NO PART OF PENALTY. See Criminal Law, 2.
7. PRELIMINARY EXAMINATION: FILING MINUTES WITH CLERK. See Criminal Law, 22.
8. INTOXICATING LIQUORS: JURISDICTION OF FIRST OFFENSE UNDER SECTION 11, CHAPTER 143, LAWS OF 1884. See Criminal Law, 2.

LAND.

1. PERMANENT SURVEY OF BY COMMISSIONERS TO ESTABLISH BOUNDARIES: PETITION FOR COMMISSION, AND PRACTICE ON. See *Boundaries*, 1, 2, 3.
2. DESCRIPTION OF: JUDICIAL NOTICE OF LOCATION BY TOWNSHIP AND RANGE. See *Tax Sale and Deed*, 18.

See *CONVEYANCE*, 1, 2.

TITLE, 1, 2, 5.

STATUTE OF LIMITATIONS, 1.

TRESPASS, 1, 2.

LANDLORD AND TENANT.

1. LANDLORD'S LIEN: ON STOCK OF GOODS OF FIRM DISSOLVED BY DEATH: REMEDY: RESTRAINT OF SALE BY SURVIVING PARTNER. Where a mercantile firm was occupying for its business a leased store-room, and the firm was dissolved by the death of one of the partners, the landlord had a lien on the stock of goods for the rent which would accrue under the lease; but the surviving partner had also the right to close out the business in such manner as he might deem for the best interests of all concerned,—that is, the creditors of the firm, the representatives of the deceased partner, and himself; and the landlord was not in such case entitled to an injunction compelling the surviving partner to hold the goods till the expiration of the term of the lease, or to sell them only in the ordinary course of trade, especially where the surviving partner was a man of ample means. The law provides a more appropriate remedy, if any is needed, in such a case. *Milner v. Cooper & Co.*, 190.
2. HUSBAND LEASING LAND OF INSANE WIFE. Persons renting of a husband land belonging to his insane wife will be regarded as tenants of the wife. *Thode v. Spofford*, 294.
3. ACQUIRING ADVERSE TAX TITLE BY TENANT. Tenants are bound to know that their possession is the possession of their landlord, and that such possession for more than five years after a tax title accrues bars all rights of the holder of the tax title to the possession of the premises, and they cannot, by taking a warranty deed from the holder of the tax title, after it is so barred, claim anything, as innocent purchasers, against their landlord. *Id.*
4. INJUNCTION IN AID OF LANDLORD'S LIEN: FACTS NOT WARRANTING: DISCRETION OF TRIAL COURT. While the granting as well as the dissolving of an injunction rests much in the discretion of the court, and while such discretion will not be interfered with by the appellate court, except where there is a manifest abuse of discretion or a mistake of law, yet, in this case, where the injunction was granted to restrain the removal of goods from a store-room, for the purpose of preserving plaintiff's alleged lien for rent, but it appears that between plaintiff and defendants the relation of landlord and tenant never existed, (for the facts see opinion,) and that defendants held the store-room only under an assignment of the lease from plaintiff, which assignment the landlord refused to recognize, and that defendants had more than paid plaintiff for the time they had occupied under the assignment, *held* that the injunction should have been dissolved upon interlocutory motion, and that it was reversible error to overrule the motion and to continue the injunction to the hearing. *Stibbs v. Agner*, 318.

5. POSSESSION UNDER VOID LEASE: LIABILITY FOR RENT RESERVED. A lessee of land for coal-mining purposes, under a lease which is void, is not liable for rent, where he has done no mining, although he may have enjoyed undisturbed possession of the land, so far as necessary for the purpose of prospecting for coal. *Franklin v. Twogood*, 18 Iowa, 515, and *Shawhan v. Long*, 26 Id., 488, distinguished. *Capper v. Sibley*, 754.

LANDLORD'S LIEN.

See LANDLORD AND TENANT, 1, 4.

LARCENY.

1. POSSESSION OF STOLEN GOODS: EVIDENCE TO OVERCOME PRESUMPTION OF GUILT. See Criminal Law, 10.
2. OF MONEY FROM PERSON: SUFFICIENCY OF INDICTMENT: EVIDENCE TO EXPLAIN POSSESSION OF MONEY. See Criminal Law, 40, 41.

LAWS.

See STATUTES CITED, CONSTRUED, ETC.

FOREIGN STATUTES.

LEASEHOLD.

1. SALE OF LEASEHOLD INTEREST IN LAND ON EXECUTION. See Judgment and Decree, 5.

LEGISLATURE.

1. POWER OVER CITY STREETS. See Cities and Towns, 4.
2. CERTAIN ACTS OF CONSIDERED WITH REFERENCE TO CONSTITUTION. See Constitutional Law, 4, 6, 9, 11.

LETTER.

1. CONTRACT BY: WHAT NECESSARY TO CONSTITUTE. See Contract, 14.

LETTER OF CREDIT.

1. WHAT IS NOT: AGREEMENT TO BECOME BOUND BY NOTE: CONDITIONS OF LIABILITY. Defendant wrote to plaintiffs as follows: "K. wants a little money. If you want any one on the note, I will fix it when I come in." Held that this was not a letter of credit, nor an independent contract to pay the loan, but an agreement to become bound by a note in some one of the many ways by which he could be so bound; and that he was not bound at all until his proposition was, within a reasonable time, accepted, and the manner indicated in which he should become a party to the note,—which was never done. *Scribner, Burroughs & Co. v. Rutherford*, 551.
2. ———: RATIFICATION: STATUTE OF FRAUDS. In such case, a subsequent oral agreement to pay the money borrowed by K. did not create any liability by reason of the letter, but was a separate contract, and within the statute of frauds. *Id.*
3. WHAT IS. A letter of credit is, in effect, an absolute undertaking to pay the money advanced upon the faith of the instrument. *Id.*

LEVY.

1. OF ATTACHMENT: TRESPASS. See Attorney at Law, 3; Judgment and Decree, 8.
2. OF EXECUTION. See Execution, 1, 2, 4; Judgment and Decree, 5.

LEX LOCI CONTRACTUS.

See SALE, 3.

LICENSE.

1. TO SELL LIQUORS: FORFEITURE OF. See Pharmacist, 1, 2, 3; Commissioners of Pharmacy, 2.

LIEN.

1. OF MORTGAGEE ON PROCEEDS OF SALE OF MORTGAGED CHATTELS: FACTS NOT ENTITLING TO. See Chattel Mortgage, 1.
2. QUESTION OF PRIORITY UNDER CHATTEL MORTGAGES: PECULIAR FACTS. See Chattel Mortgage, 4.
3. OF JUDGMENT. See Judgment and Decree, 5, 6; Railroads, 17, 24.
See MECHANIC'S LIEN.

LIMITATION OF ACTIONS.

1. BY STATUTE. See Statute of Limitations.
2. BY CONTRACT. See Insurance, 2, 10.
3. IN TAX-TITLE CASES. See Landlord and Tenant, 3; Tax Sale and Deed, 6; Tax Title, 1, 2.

LIVE STOCK.

1. RELEASING DISTRAINED SWINE. See Criminal Law, 24.

MALICIOUS PROSECUTION.

1. COUNTER-CLAIM FOR DAMAGES. No action can be maintained for a malicious prosecution until the action complained of is ended. Hence the damages for such prosecution cannot be set up as a counter-claim to the alleged malicious action. *Brooks v. Westover*, 369.

MANDAMUS.

See SCHOOL DISTRICTS, 1.

MANSLAUGHTER.

1. EVIDENCE INSUFFICIENT TO ESTABLISH. See Criminal Law, 33.

MARSHALING ASSETS.

See EQUITY, 4.

MASTER AND SERVANT.

1. INJURY BY NEGLIGENCE OF FELLOW SERVANT: LIABILITY OF MASTER: EVIDENCE. Plaintiff, a carpenter, sued defendant, a contractor and his employer, on account of an injury received by falling from a defective

scaffold; but, it appearing that the scaffold was erected by a fellow servant, the defendant not being present, and their being no evidence that defendant was negligent in the employment of unskillful workmen, or in failing to furnish suitable materials with which to erect the scaffold, *held* that no recovery could be had, and that the trial court properly directed a verdict for defendant. *Benn v. Null*, 407.

2. INJURY TO MINER: KNOWN NEGLIGENCE WAIVED AND RISK ASSUMED. A miner cannot recover of his employer for an injury caused by a defect in the track or cars used in the mine, or by the want of appliances connected therewith, the condition of which he knew, or in the exercise of ordinary care should have known, at and before the time of the alleged injury, if the alleged defects were such as he ought reasonably to have foreseen might endanger his safety. *Heath v. Whitebreast Coal & Mining Co.*, 737.
3. AS TO RAILROAD COMPANIES AND THEIR EMPLOYEES. See Railroads, *passim*.

MEASURE OF DAMAGES.

See DAMAGES.

MECHANIC'S LIEN.

1. FOR WORK AND MATERIALS ONLY: RULE APPLIED. A mechanic's lien will attach, and can be enforced, for work and materials only. Accordingly, where plaintiff and defendant traded properties, and defendant's property was estimated to be worth \$250 more than plaintiff's, and plaintiff agreed to pay this difference in work and materials to be furnished for a house for defendant, but defendant's property was mortgaged for \$250, which she agreed to pay, and plaintiff performed his part of the contract by furnishing the labor and materials, but defendant failed to pay off the mortgage, *held* that defendant's indebtedness to plaintiff was not for the labor and materials furnished, and that a mechanic's lien would not attach therefor to the property for which they were furnished. *Brown v. Rodocker*, 55.
2. SUB-CONTRACTOR: EXCESSIVE DEMAND: ACTION TO ENFORCE: DEMURRER. Where plaintiff, a sub-contractor, filed a statement and claim for a mechanic's lien, and blended in his statement his account for moneys received and disbursed for his immediate employer with his account for labor performed by him, and then claimed a lien for the general balance, which was much greater than the balance actually due him for labor, and these facts were apparent upon the face of his statement, *held*, in an action to establish the lien, that a demurrer was properly sustained thereto, because the statement and claim filed was not a "just and true statement" as required by the statute, (Laws of 1876, Ch. 100, § 6,) and did not entitle plaintiff to a lien. Whether a mere mistake in claiming a lien for too large a sum would defeat the claimant, *quære*. *Stubbs v. Clarinda, C. S. & S. W. R'y Co.*, 513.

MINES AND MINING.

1. ACTIONS FOR INJURIES TO MINERS ON GROUND OF NEGLIGENCE. See Master and Servant, 2; Railroads, 25.

MISTAKE.

1. EQUITY DOES NOT RELIEVE AGAINST MISTAKES IN MATTERS OF LAW. See Contract, 1.

2. AS TO SUBJECT-MATTER OF CONTRACT: RELIEF IN EQUITY. See Contract, 10.
3. IN DESCRIPTION OF LAND IN DEED: RELIEF IN EQUITY. See Conveyance, 2.

MORTGAGE.

1. FORECLOSURE: DEFENSE OF PAYMENT: QUESTION OF FACT. This being an action for the foreclosure of a mortgage, it is triable *de novo* in this court; and the only question being one of fact as to the payment of the mortgage debt, the evidence is considered, and held to establish the defense of payment. *Wells v. Lawrence*, 373.
2. MORTGAGEE BOUND BY DECREE AND ORDER ON WHICH MORTGAGOR'S TITLE IS BASED. The Central Iowa Railway Company took the title to its property under a decree and order of the circuit court of the United States, which bound it to pay defendant's claim. (See *Sloan v. Central Iowa R'y Co.*, 62 Iowa, 728.) Afterwards, but before defendant had put his claim into judgment against the railway company, it mortgaged its property to the plaintiff trust company. Held that the trust company knew, or was bound to know, that the title of the railway company was based on the decree and order, and that its mortgage was inferior as a lien to defendant's judgment. *Central Trust Co. v. Sloan*, 655.
3. RECORD OF AS EVIDENCE. See Evidence, 8.
4. FOR MORTGAGES OF CHATTELS. See Chattel Mortgage.

MUNICIPAL CORPORATION.

See CITIES AND TOWNS.

NAMES.

1. USE OF INITIALS FOR GIVEN NAME IN NOTICE. See Tax Sale and Deed, 17.

NEGLIGENCE.

1. PLEADING: EVIDENCE. Where plaintiff averred negligence of one kind, it was erroneous to permit him, over defendant's objection, to introduce testimony as to negligence of a different kind, not referred to in the petition. *Carter v. K. C., St. J. & C. B. R'y Co.* 287.
2. FOR ACTIONS FOUNDED UPON NEGLIGENCE, AND THE LAW RELATING THERETO. See Cities and Towns, 3; Master and Servant, 1, 2; Railroads, *passim*.

NEGOTIABLE INSTRUMENTS.

See PROMISSORY NOTE.

NEW TRIAL.

1. EXCESSIVE DAMAGES: DISCRETION OF COURT: PRACTICE ON APPEAL. When the trial judge has determined that the fair administration of the law demands that a new trial should be granted for any cause known to the law, (excessive damages in this case) this court will interfere only when it is clearly shown that he has abused the discretion which the law vests in him. *Rogers v. Winch*, 168.

2. **FAILURE TO ASSESS NOMINAL DAMAGES.** An omission to assess nominal damages, where there is a mere technical right to recover, is no ground for a new trial. *Watson v. Van Meter*, 43 Iowa, 76, followed. *Norman v. Winch*, 263.
3. **MISCONDUCT OF JUROR: DISCUSSION OF CASE: AFFIDAVITS CONSIDERED.** A new trial was sought by defendant on the ground that one of the jurors had permitted the case to be discussed in his presence during an adjournment; but, upon consideration of the affidavits of the parties, (see opinion,) *held* that no facts were established thereby, as distinguished from legal conclusions, which showed prejudice to the defendant, and made it obligatory on the court to grant a new trial. *Ridenour v. City of Clarinda*, 465.
4. **SPECIAL FINDING CONTRARY TO EVIDENCE.** Where the jury makes a special finding contrary to the evidence, upon a material and important point, a fair trial cannot be presumed, and the verdict should be set aside at the instance of the party prejudiced. *Heath v. Whitebreast Coal & Mining Co.*, 737.
5. **WHEN COURT HAS NO DISCRETION TO GRANT: ERROR NOT WAIVED.** See Practice, 6, 7.
6. **PRESUMPTION ON APPEAL IN FAVOR OF RULING OF TRIAL COURT.** See Practice in Supreme Court, 12.

NOTARY PUBLIC.

1. **JUDICIAL NOTICE OF JURISDICTION: OFFICIAL SIGNATURE.** Where an affidavit purported to be made in the county of W., and the jurat was signed by one who added the words "notary public" to his name, and affixed his notarial seal, though he did not state for what county he was notary public, *held* that it was sufficient, because the court will take judicial notice that he was a notary of the county of W. But in the case of acknowledgments the rule is different. See *Willard v. Cramer*, 36 Iowa, 22. *Stoddard v. Sloan*, 680.

NOTES AND BILLS.

See PROMISSORY NOTE.

NOTICE.

1. **POSSESSION OF CHATTELS BY THE MORTGAGEE OR VENDEE IS NOTICE OF HIS RIGHTS IN THE PROPERTY.** See Chattel Mortgage, 3; Sale, 1.
2. **USE OF INITIALS FOR GIVEN NAME JUSTIFIED.** See Tax Sale and Deed, 17.

See ORIGINAL NOTICE.

NUISANCE.

1. **WHAT CONSTITUTES A SALOON A NUISANCE: EVIDENCE: DRUNKENNESS DEFINED.** See Criminal Law, 11, 12, 13, 14.

OFFICER.

1. **RIGHT TO SEARCH PRISONER AND RETAIN PROPERTY: CONSENT.** See Attachment, 1, 2.

See EXECUTION.

ORDINANCE.

1. REGULATING SPEED OF CARS IN CITIES: CONSTRUCTION AND APPLICATION OF. See Railroads, 20.

ORIGINAL NOTICE.

1. NECESSITY OF IN CROSS-ACTION BY DEFENDANT AGAINST CO-DEFENDANT. See Jurisdiction, 1.

PARENT AND CHILD.

1. SUPPORT OF PARENT BY CHILD: COMPENSATION. A son cannot recover of his father's estate compensation for the support of his father in his family, as a member thereof, in the absence of a contract for such compensation; and the evidence in this case (see opinion) does not support the theory that there was such a contract. *Traver v. Shiner*, 57.

PARTIES TO ACTIONS.

1. COMMON INTEREST: SUIT BY ONE FOR BENEFIT OF ALL: CODE, § 2549. Where the parties interested are numerous, and it is impracticable to bring them all before the court, and they have a common interest in the subject of the litigation, arising from the fact that they all hold land under the conveyance which defendants fraudulently seek to defeat, one of them may prosecute an action for the benefit of all to enjoin the consummation of the fraud, under Code, § 2549,—following *Brandriff v. Harrison Co.*, 50 Iowa, 164. *Fleming v. Mershon*, 36 Id., 413, distinguished. *Palo Alto Banking, etc., Co. v. Mahar*, 74.
2. DEFENDANTS IN INJUNCTION TO DEFEAT CONSPIRACY IN CONVEYANCE OF LAND. See Injunction, 2, 3.
3. DEFENDANTS IN ACTIONS FOR DAMAGES FOR WRONGFUL SALES OF LIQUORS. See Intoxicating Liquors, 3.
4. JOINDER OF PLAINTIFFS: FACTS JUSTIFYING. See Railroads, 2.

PARTITION.

1. OF LANDS OWNED BY FIRM: FACTS NOT ENTITLING TO. Where plaintiff and defendant entered into a partnership for the purchase and sale of certain lands with defendant's money,—plaintiff's services being put against the use of defendant's money,—with the understanding that, upon the sale of the lands, defendant should be reimbursed for the money advanced, with interest, and that the profits of the venture should be divided, and the lands were purchased accordingly in defendant's name, *held* that plaintiff was entitled to no part of the lands or profits until a final settlement of the partnership, and that an action brought by him before that time for a partition of the lands was properly dismissed. *Pennybacker v. Leay*, 220.

PARTNERSHIP.

1. CONTRACT FOR DISSOLUTION: CONSTRUCTION OF. See Contract, 6.
2. RIGHT OF SURVIVOR TO CLOSE OUT THE BUSINESS. See Landlord and Tenant, 1.
3. LANDS BELONGING TO FIRM: PARTITION OF. See Partition, 1.

PARTY WALL.

1. **WHAT IS: RECOVERY FOR USE OF: MEASURE OF DAMAGES.** Where plaintiff purchased a lot of defendant, and agreed to erect a building thereon, and it was further agreed between them that when the defendant erected a building upon the adjoining lot he would construct, in connection with the plaintiff's building, a stairway to the second story, one-half of which should be on the ground of each party, and plaintiff, accordingly, built his wall 20 inches from the line, and defendant not only used the wall so built for the purpose of the stairway, but built into it in such a way as to support his own building, and in a way not demanded for the support of the stairway, then the wall became a party wall, and plaintiff was entitled to recover one-half the value thereof at the time defendant so used it, with interest at six per cent. *Molony v. Dixon*, 136.
2. **PROCEDURE: CHOICE OF REMEDIES.** In such case, the defendant, before building into the wall, should have paid plaintiff one-half the value thereof, and, in case of disagreement, should have had the value appraised, as provided in section 2020 of the Code; but, upon his failing to do so, the plaintiff might possibly have enjoined his building into it; but she was not obliged to do so, nor was it necessary for her to have the value of the wall appraised, in order to maintain an action for half its value. *Id.*
3. **PILASTER PART OF WALL.** In such case, a pilaster at the front of the party wall, and on which rested the lintel over the stairway, was a part of the wall to be paid for. *Id.*
4. **WHAT IS NOT.** In such case, the wall built by defendant over and in front of the stairway was a part of the front wall of his own building, and plaintiff was not liable for half the cost thereof. *Id.*

PATENT-RIGHT.

1. **ASSIGNMENT OF: PAROL TO SHOW INTENTION: FRAUD IN SALE OF: EVIDENCE.** See Evidence, 20, 21, 22; Fraud, 3.

PAYMENT.

1. **MORTGAGE: PURCHASE OF LAND WITH AGREEMENT TO PAY: FACTS CONSTITUTING PAYMENT.** Defendants purchased land encumbered by a mortgage, and agreed to pay the mortgage. Plaintiff afterwards came into possession of the note secured by the mortgage, and brought this suit to recover on defendants' promise to pay it. The trial being to the court, *held* that the evidence (see opinion) tended in some degree to establish the defense of prior payment, and that the finding and judgment of the court to that effect could not be disturbed. *Smalley v. Mores*, 386.
2. **PAYMENT TO TRUSTEE BINDS BENEFICIARIES AND DISCHARGES DEBTOR.** See Trust, 2, 3, 4.

PERSONAL INJURY.

1. **FOR ACTIONS TO RECOVER FOR PERSONAL INJURIES,** see Cities and Towns, 3; Master and Servant, 1, 2; Railroads, *passim*.

PERSONAL PROPERTY.

See CHATTEL MORTGAGE.

SALE.

PHARMACIST.

1. **UNLAWFUL SALE OF LIQUORS BY: FORFEITURE OF LICENSE.** For the unlawful sale of intoxicating liquors, the commissioners of pharmacy may revoke the certificate of a registered pharmacist and strike his name from the register. *Hildreth v. Crawford*, 339.
2. **REVOCATION OF LICENSE: UNLAWFUL SALE OF LIQUORS: INTOXICATING AND ALCOHOLIC.** Under sections 8 and 9, chapter 75, Acts of Eighteenth General Assembly, a pharmacist's license may be revoked by the commissioners of pharmacy for the sale of either intoxicating or alcoholic liquors. *Id.*
3. ———: ———: **NUMBER OF OFFENSES.** Under section 8 of the said act, such license may be revoked for a single unlawful sale of intoxicating liquors. *Id.*

PHYSICIAN AND PATIENT.

1. **PRIVILEGED COMMUNICATIONS.** See Evidence, 3, 4.

PLACE OF SUIT.

See VENUE.

PLEADING.

1. **INCONSISTENT DEFENSES: EFFECT OF ADMISSIONS.** Under section 2710 of the Code, a defendant may plead inconsistent defenses in the same pleading; and admissions made in one defense are not to be construed as affecting a different and inconsistent defense. See *Barr v. Hack*, 46 Iowa, 308. *Heinrichs v. Terrell*, 25.
2. **DENIAL: REPETITION OF AVERMENT.** Where an averment in an answer is denied in a reply, and the same averment is repeated in an amendment, no further denial thereof is necessary. *Maxwell v. Hunter*, 121.
3. **STRIKING EVIDENCE FROM PETITION: ERROR WITHOUT PREJUDICE.** Letters which were evidence only of ultimate facts pleaded should have been stricken from the petition on defendant's motion, but, it appearing that defendant could not have been prejudiced by the overruling of such motion, a reversal will not be granted on that account. *Eggles-ton v. Council Bluffs Ins. Co.*, 308.
4. **REPLY: WHEN NOT REQUIRED: INSTANCE.** Under section 2665 of the Code, where, in an action to quiet a tax title, defendant alleged that the land was taxed to it at the time the deed was executed, and that no notice to redeem was served upon it, *held* that no denial by way of a reply was necessary to put the allegation that the land was taxed to defendant in issue. *Walker v. Sioux City & Iowa Falls Town Lot Co.*, 563.
5. **PETITION FOR COMMISSION TO ESTABLISH BOUNDARIES: WHAT IT SHOULD STATE.** See Boundaries, 2.
6. **FRAUD IN CONVEYING PROPERTY: EVIDENCE.** See Fraudulent Conveyance, 3.
7. **CONTROVERTING ANSWER OF GARNISHEE.** See Garnishment, 2.
8. **PERSONAL INJURY: NEGLIGENCE.** See Railroads, 21.

POSSESSION.

1. OF CHATTELS BY MORTGAGEE: NOTICE TO ATTACHING CREDITORS. See Chattel Mortgage, 3.
2. OF CHATTELS BY VENDEE: NOTICE OF INTEREST. See Sale, 1.
3. OF CHATTELS BY VENDEE: WHAT IS NOT: CODE, § 1922. See Sale, 2.
4. OF LAND: FACTS NOT AMOUNTING TO. See Tax Sale and Deed, 16.

PRACTICE.

1. ORDER OF TESTIMONY: DISCRETION OF COURT: EXAMPLE. The order in which evidence should be introduced is largely in the discretion of the court, and the admission of material evidence at any time during the trial cannot ordinarily be said to constitute error; and so, ordinarily, in an action for trespass on land, it is not error to admit in evidence a deed of the premises made by another to plaintiff, although plaintiff has not as yet shown that such other person had any title. *Heinrichs v. Terrell*, 25.
2. INSTRUCTIONS: REVIEWING TESTIMONY. Under our practice, it is not practicable nor necessary for the court to take up the several facts and circumstances testified to by the witnesses, and instruct the jury as to their weight and effect. *State v. Miller*, 60.
3. TAKING ISSUE FROM JURY. Where an issue is made by the answer, and there is some, though slight, evidence to sustain it, it should be submitted to the jury. *Parker v. Middleton*, 200.
4. BILL OF EXCEPTIONS: INSTRUCTIONS. Instructions are a part of the record, and need not be made such by bill of exceptions. *Id.*
5. EXCEPTIONS TO INSTRUCTIONS: WHEN TAKEN. Instructions need not be excepted to when given. It may be done within three days after verdict, in a motion for a new trial. Code, § 2789. *Id.*
6. NEW TRIAL: EVIDENCE TO SUSTAIN VERDICT. Where there is no conflict in the evidence, and the correctness of the verdict can be demonstrated by a mathematical calculation, the trial court has no discretion in the premises, and an order setting aside the verdict and granting a new trial must be reversed on appeal. *Anderson & Co. v. Cahill*, 252.
7. ERROR IN GRANTING NEW TRIAL: NOT WAIVED BY MOTION TO RECONSIDER. Where there was error in granting a new trial, the aggrieved party did not waive the error by filing a motion asking the court to re-examine the question determined. *Id.*
8. MOTION TO CANCEL JUDGMENT: AUTHORITY OF COURT. In the absence of statutory authority, a court has no jurisdiction to cancel a judgment on motion based upon grounds existing prior to its rendition. Section 2867 of the Code does not give such authority. *Brett v. Myers*, 274.
9. RIGHT TO DISMISS WITHOUT PREJUDICE: FINAL SUBMISSION: WHAT IS NOT. Before a case has been finally submitted, the plaintiff has the right to dismiss it without prejudice to a future action; (Code, § 2844;) and a case is not *finally* submitted when, after being once submitted, the court permits an amendment raising a new issue. *Jones v. Currier*, 533.
10. KIND OF PROCEEDINGS: ACTION TO ENFORCE LIEN UPON REAL ESTATE: THIRD PARTIES INTERESTED. An action brought to enforce an alleged lien upon real estate in which third parties, made defendants, are inter-

ested, and where questions as to the validity of conveyances and mortgages and the priority of liens are to be determined, is an action by equitable proceedings, and defendants in such an action are not entitled to a jury trial. *Buckham v. Grape*, 535.

11. MOTION IN VACATION: JURISDICTION. A motion in arrest, and for judgment notwithstanding the verdict, cannot be filed and considered in vacation without an express agreement of the parties to that effect. Code, § 183. *Scribner, Burroughs & Co. v. Rutherford*, 551.
12. ERROR IN KIND OF PROCEEDINGS: WAIVER OF BY DEFENDANT. See Action, 1.
13. ON PETITION FOR COMMISSION TO ESTABLISH BOUNDARY LINES. See Boundaries, 1, 2, 3.
14. FOR PRACTICE IN CRIMINAL CASES. See Criminal Law, *passim*.
15. FOR PRACTICE ON INTRODUCTION OF EVIDENCE. See Evidence, *passim*.
16. ON HABEAS CORPUS: AGREED RECORD NOT ALLOWED. See Habeas Corpus, 1.
17. ON MOTION TO DISSOLVE INJUNCTION. See Injunction, 1.
18. IN ACTIONS FOR DAMAGES BY WRONGFUL SALE OF LIQUORS. See Intoxicating Liquors, 3.
19. IN ACTION TO REVOKE PERMIT TO SELL LIQUORS. See Intoxicating Liquors, 4, 5, 6.
20. INSTRUCTING JURY AS TO ISSUES. See Instructions, 5.
21. ARGUMENT TO JURY NOT WARRANTED BY EVIDENCE: INSTRUCTION TO OBIVATE PREJUDICE. See Instructions, 6.
22. FOR PRACTICE BEFORE JUSTICES OF THE PEACE. See Justices' Courts.

PRACTICE IN SUPREME COURT.

1. EVIDENCE: DEFECTIVE RECORD: WAIVER BY APPELLEE. Where appellant has filed an abstract which purports to contain all the evidence offered on the trial below, and appellee files an additional abstract, correcting appellant's abstract by striking out portions of it, and adding evidence which it claims was given on the trial, but omitted from appellant's abstract, appellee, by so doing, admits, inferentially at least, that the record, as thus amended, contains all the evidence, and he cannot afterwards, on motion, have the evidence stricken out on the ground that it was not certified or preserved by bill of exceptions. See opinion for cases cited and followed. *Wilson v. Palo Alto County*, 18.
2. LAW CASE: POINT NOT RAISED BELOW NOT CONSIDERED. On appeal to this court in an action by ordinary proceedings, no question will be considered which was not presented and ruled upon in the trial court. *Id.*
3. WAIVER OF GROUND OF DEFENSE. Where a point is raised by the answer as a ground of defense, and it may have been the ground on which the trial court based its judgment for defendant, the point will not be disregarded in this court, unless expressly waived. *Sulliff v. Brown*, 42.
4. STARE DECISIS: INSTANCE. When this court has once definitely passed upon a question in a case, the ruling will not be reconsidered upon a second appeal, unless there have been such changes in the issues, or other circumstances of the case, as to raise a new question as to the applicability of the former ruling to the case as thus made. See opinion for illustration. *Minnesota Linseed Oil Co. v. Montague & Smith*, 67.

5. **QUESTIONS PASSED UPON BELOW ALONE CONSIDERED: INSTANCE.** Where defendant, for a special reason stated, going to the merits of the case, moved the court to direct the jury to return a verdict in its favor, and the court did so, it must be presumed that it did so for the reason stated; and if that reason was not good in law, the ruling must be reversed, even though it may be urged (for the first time) in this court that the ruling was right for another reason, viz., a variance between the petition and evidence; for, if the motion had been sustained by the trial court for that reason, plaintiff would have had the right to cure the variance by amendment. *Knapp v. Sioux City & Pac. R'y Co.*, 91.
6. **QUESTION NOT RAISED BELOW.** Questions which appellant might have had determined in the court below, but which he failed there to present, cannot for the first time be raised in this court. *Schlisman v. Webber*, 114.
7. **VARIANCE DISREGARDED.** Where appellant's answer was in confession and avoidance of the tax deed on which plaintiff relied, appellant cannot, on appeal to this court, avoid the force of such confession, by pointing out in appellant's abstract an apparent variance between the allegation and the proof of the thing thus confessed. *Maxwell v. Hunter*, 121.
8. **EVIDENCE.** Evidence upon the merits cannot be introduced for the first time in this court. *Garmoe v. Sturgeon*, 147.
9. **RECORD PERFECTED BY AMENDED ABSTRACT.** Although, on an appeal to the supreme court, appellant's original abstract is insufficient to sustain the appeal, its defects may be cured by amendments subsequently filed. *Frost v. Parker*, 173.
10. **AMENDING ABSTRACT: LEAVE: NOTICE.** No leave of court or notice to the appellee is required to enable an appellant in the supreme court to file an amendment to his abstract. *Id.*
11. **EVIDENCE: NO PREJUDICE—NO REVERSAL.** The admission of certain evidence in this case, if it was not necessary under the issues, could not have prejudiced appellant, and is, therefore, no ground for a reversal. *University of Des Moines v. Livingston*, 202.
12. **NEW TRIAL: VERDICT AGAINST EVIDENCE: PRESUMPTION IN FAVOR OF TRIAL COURT.** Where there has been a verdict for the plaintiff, and the court has granted a new trial on the ground that the verdict is not supported by the evidence, the order will not be disturbed on appeal, if there was evidence tending in any degree to establish any of the defenses pleaded. And where, in such case, there were two defenses, and there was no evidence to sustain the first, but some evidence to sustain the second, it must be presumed that the court's order was based on the evidence relating to the second defense. *Engs & Sons v. Priest*, 232.
13. **CRIMINAL LAW: MEASURE OF PUNISHMENT: REVIEW OF.** A criminal sentence will not be mitigated in this court where no abuse of discretion is shown on the part of the trial court. *Id.*
14. **TRIAL DE NOVO: INSUFFICIENT ABSTRACT.** A trial *de novo* cannot be had in this court upon an abstract which does not purport to be an abstract of all the evidence. *Brooks v. Westover*, 369.
15. **ERROR WITHOUT PREJUDICE: NO GROUND FOR REVERSAL.** Where it is clear that an appellant could not possibly have recovered, the overruling of interlocutory motions made by him, though technically erroneous, will not justify a reversal. *Id.*
16. **CONSTITUTIONAL QUESTIONS CONSIDERED WITH RELUCTANCE.** This court will not undertake to determine constitutional questions which do

not necessarily arise in a case; and where a party assails the constitutionality of a law, and comes here as appellant, the court will scrutinize with more than ordinary strictness the record which he brings, to determine whether a constitutional question is necessarily involved. *State v. Rosencrans*, 382.

17. **EXCLUSION OF: ERROR WITHOUT PREJUDICE.** Error in excluding competent evidence is no ground for reversal, where, from the whole record, it is clear that the judgment could not have been different had the evidence been admitted. *Perkins & Gray v. Anderson*, 398.
18. **TRIAL DE NOVO: RECORD AS TO EVIDENCE.** A trial *de novo* cannot be had in this court unless the evidence is certified within the time allowed for an appeal, (Laws of 1882, Ch. 35,) in the absence of an agreement that the abstract contains all the evidence. *Preston v. Hale*, 409.
19. **AGREEMENT TO ABSTRACT: EVIDENCE TO ESTABLISH.** This court is precluded by statute (Code, § 213) from finding from affidavits alone that counsel for appellee agreed to appellant's abstract of the evidence. *Id.*
20. **QUESTIONS REQUIRING THE EVIDENCE: DEFECTIVE ABSTRACT.** This court cannot pass upon questions relating to the evidence,—such as the sufficiency of the evidence to support the verdict, the propriety of instructions, and the like,—unless the abstract claims to contain all the evidence. *Rosecrans v. Iowa & Minnesota Tel. Co.*, 444.
21. **REVIEWING INSTRUCTIONS WITHOUT THE EVIDENCE.** This court cannot say that instructions, which are correct as abstract propositions, were improperly given in a certain case, unless the evidence is contained in the record. *State v. Benton*, 482.
22. **SURPRISE: OBJECTION TOO LATE ON APPEAL.** Where the case was called for trial, and defendant made no objection to proceeding to trial, he cannot for the first time in this court complain that he was not prepared for trial, because his counsel had no opportunity to consult with him and prepare his defense. *Id.*
23. **EVIDENCE: ERROR IN EXCLUDING: CORRECTION ON APPEAL: PRACTICE.** This court cannot say that there was error in permitting answers to certain questions, when it does not appear what evidence was expected to be elicited. *State v. Montgomery*, 483.
24. **EVIDENCE TO SUPPORT VERDICT.** This court cannot consider whether a verdict is or is not supported by the evidence when the abstract does not contain all the evidence. *Crystal v. City of Des Moines*, 502.
25. **CONFLICTING EVIDENCE TO SUPPORT VERDICT.** The evidence being in conflict, this court cannot, under the well established rule, set aside the verdict as not being supported by the evidence. *Moore v. Chicago, B. & Q. R'y Co.*, 503.
26. **EVIDENCE: ERROR IN EXCLUDING MUST AFFIRMATIVELY APPEAR.** Where the record fails to show the grounds on which evidence was excluded, this court cannot say that there was error in excluding it. Error must affirmatively appear. *Jones v. Currier*, 533.
27. **ABSTRACT NOT DENIED: MOTION TO STRIKE OUT EVIDENCE.** Where appellant in an amended abstract states that the original and amended abstracts contain all the evidence, and this is not denied by appellee, it must be taken as true, and a motion to strike out the evidence in such case, because not properly certified, overruled. *Paine v. Means*, 547.
28. **EVIDENCE TAKEN IN SHORT-HAND: HOW CERTIFIED.** Evidence taken in short-hand can become the written evidence, for the purpose of an

appeal, only when it is translated, and the translation is certified by the reporter. (Code, § 3777.) The certificate of the judge, who cannot read the short-hand notes, that they show all the evidence offered and received, cannot give them the character of written evidence. *Richards v. Lounesbury*, 587.

29. **RIGHTS OF APPELLEE.** One who has not appealed cannot be heard to object to any part of the judgment appealed from. *Ind. Dist. of Mt. Vernon v. Ind. Dist. of Harris Grove*, 590.
30. **CAUSE TRIABLE DE NOVO REMANDED IN INTEREST OF JUSTICE.** Although this cause is triable *de novo* in this court, yet, as the record is such that it is impossible to determine therefrom what judgment should be rendered, it is remanded to the court below, with leave to both parties to replead in accordance with the suggestions contained in the opinion. *Hull v. Chicago, B. & P. R'y Co.*, 713.
31. **OBJECTION TO KIND OF PROCEEDINGS MUST BE MADE BELOW.** See Action, 1.
32. **PARTY NOT APPEALING CANNOT BE HEARD TO COMPLAIN.** See Appeal, 5.
33. **ERRORS NOT ASSIGNED WILL NOT BE CONSIDERED.** *Stevens v. Holmes*, 129.
34. **ERROR IN ADMITTING EVIDENCE AS GROUND OF REVERSAL.** See Evidence, 9, 10.
35. **DISCRETION OF LOWER COURT IN GRANTING NEW TRIAL RESPECTED.** See New Trial, 1.
36. **NO REVERSAL FOR MERELY NOMINAL DAMAGES.** See Sale, 4.

PRINCIPAL AND AGENT.

1. **AMBIGUOUS INSTRUCTIONS: INTERPRETATION.** Where a principal gives to his agent instructions which are susceptible of two meanings, that meaning which the agent in good faith attaches to them and acts upon is to be adopted; and if loss occurs thereby, the principal and not the agent must bear it; and it matters not whether the principal had reason to believe, or not, that the agent so understood the instructions. *Minnesota Linseed Oil Co. v. Montague & Smith*, 67.
2. **REPORT OF AGENT: RATIFICATION BY SILENCE.** Where an agent for disbursing funds makes a report to his principal, showing his disbursements, and accompanied with a draft for the balance in his hands, the principal must within a reasonable time (a question for the jury) examine the report, and make known to the agent any objections which he may desire to make thereto. Failing so to do within a reasonable time, his silence will be treated as a ratification of the agent's disbursements. *Id.*
3. **FOR AUTHORITY OF ATTORNEY TO BIND HIS CLIENT.** See Attorney at Law, 1, 3.
4. **INSURANCE COMPANY BOUND BY KNOWLEDGE OF AGENT.** See Insurance, 5.
5. **PRINCIPAL BOUND BY ACTS OF AGENT IN SALE OF GOODS.** See Sale, 14, 15.
6. **AGENT CANNOT ACQUIRE TAX TITLE TO PRINCIPAL'S LAND.** See Tax Sale and Deed, 15.

PRINCIPAL AND SURETY.

1. **DUTY OF CREDITOR TO INFORM SURETY OF FACTS RELATING TO THE RISK.** If a surety, before becoming such, applies to the creditor for information relating to the risk about to be assumed, the creditor, if he answers at all, must disclose all the facts which he knows material to the inquiry: and he can do nothing to deceive or mislead the surety without violating the agreement. Whether the creditor is bound, on his own motion, to disclose to one about to become a surety facts within his knowledge increasing the risk, depends on the circumstances of the case. If there is nothing in the circumstances to indicate that the surety is being misled or deceived, or is ignorant of facts materially affecting the risk, the creditor is not bound to seek him out and inform him of the facts; but if he knows, or has good grounds for believing, that the surety is being deceived or misled, or has entered into the contract in ignorance of facts materially increasing the risk, and he knows of such facts, and has an opportunity to disclose them to the surety before accepting the obligation, he must do so, or, for his want of fair dealing in this respect, the surety may afterwards avoid the contract. See opinion for authorities collated by REED J. *Bank of Monros v. Anderson Bros. Mining & R'y Co.*, 692.
2. ———: **FRAUD ON SURETY: AVOIDANCE OF BY PAYEE OF NOTE: BURDEN OF PROOF.** Where the signature of a surety to a promissory note is obtained by the fraud of the principal, the burden of proof is upon the payee of the note, before he can recover, to show that he took it without knowledge of the fraud. Compare *Lane v. Krekle*, 22 Iowa, 399, and *Union National Bank v. Barber*, 56 Id., 559. *Id.*
3. **LIABILITY ON GUARDIAN'S BOND.** See Guardian and Ward, 1.

PRIORITY OF LIENS.

See CHATTEL MORTGAGE, 4.

VENDOR'S LIEN, 1.

MORTGAGE, 2.

PRISONER.

1. **RIGHT OF OFFICER TO SEARCH AND TO RETAIN PROPERTY.** See Attachment, 1.

PRIVILEGED COMMUNICATIONS.

1. **BETWEEN PHYSICIAN AND PATIENT.** See Evidence, 3, 4.

PROBATE.

1. **ORDER MADE OUTSIDE OF PROPER COUNTY VOID.** See Circuit Court, 1.

PROMISSORY NOTE.

1. **GUARANTY OF COLLECTION: LIABILITY OF GUARANTOR.** Where C. had indorsed upon a promissory note, payable to bearer, a guaranty of *payment*, with waiver of notice, and afterwards defendant indorsed thereon a guaranty of *collection*, and both of these guaranties were on the note when it became the property of plaintiff, *held* that plaintiff could not recover thereon against the defendant, without showing that he had used reasonable diligence to collect the note from both the maker and the first guarantor, unless he showed some legal excuse for his neglect to use such diligence. *Summers v. Barrett*, 292.

2. **INDORSEMENT OF PAYMENT: PRESUMPTION OF HOLDER'S CONSENT.**
Where an indorsement was made on a note while it was in the hands of the payee, the presumption must be indulged, in the absence of strong and convincing evidence to the contrary, that the indorsement was made with the knowledge and consent of the payee upon the receipt of the money named in the indorsement. *Thomassen v. Van Wyngaarden*, 687.
3. **DUTY OF PAYEE TOWARD ONE ABOUT TO BECOME SURETY: BURDEN OF PROOF TO SHOW GOOD FAITH.** See Principal and Surety, 1, 2.

PROSECUTING WITNESS.

1. **MAY EMPLOY COUNSEL TO AID DISTRICT ATTORNEY.** See Criminal Law, 28.

PUBLIC POLICY.

1. **CONTRACT AGAINST NOT ENFORCEABLE: INSTANCES.** See Contract, 5, 9.

PUBLIC SCHOOLS.

1. **DISCHARGE OF TEACHER: APPEAL TO COUNTY AND STATE SUPERINTENDENTS: ACTION FOR DAMAGES: RES ADJUDICATA: EVIDENCE.** Where a school-teacher, alleging that he had been discharged by the directors of the district, and that his discharge was unlawful, appealed to the county superintendent, who found that he had been unlawfully discharged, which finding was affirmed upon an appeal taken to the superintendent of public instruction; and he afterwards brought his action against the district to recover the damages resulting to him from the wrongful discharge, *held*, in such action, that, as to the fact of the discharge, and the wrongful character thereof, the finding of the state superintendent was final and conclusive upon the parties, and that evidence offered by the district to prove that the teacher had resigned, and had not been discharged, was incompetent. *Park v. Ind. School Dist. of Pleasant Grove*, 209.
2. **WRONGFUL DISCHARGE OF TEACHER: MEASURE OF DAMAGES.** In such case, if the teacher held himself in readiness, during the pendency of the appeal to the superintendent of public instruction, to perform his contract, and was not able to obtain other employment during that time, he was entitled to recover the wages provided for in the contract during that period. But, after the final decision of the superintendent of public instruction in his favor, it was his duty, not only to be ready to perform, but actually to perform or offer to perform the services provided for in the contract for the remainder of the term, and, without such performance or offer, he could not recover his wages after such final decision. *Id.*

PUNISHMENT.

1. **MEASURE OF: REVIEW OF IN SUPREME COURT.** See Practice in Supreme Court, 13.

RAILROADS.

1. **RISKS ASSUMED BY ENGINEER: PROXIMATE CAUSE OF INJURY: RULE APPLIED.** The plaintiff was one of defendant's locomotive engineers, and sues on account of injuries received in reversing his lever at a time when, on account of the alleged defect of the road, the train left the track. *Held* that, while the ordinary hazards of reversing the lever were assumed by plaintiff as a part of his employment, yet, if the negli-

gence of defendant required such act to be done at that particular time, and the plaintiff was not guilty of negligence, but, on the contrary, acted prudently, with due regard to his own safety and the safety of others, then defendant is liable, because its negligence was the proximate cause of the injury. See authorities cited in opinion. *Knapp v. Sioux City & Pac. R'y Co.*, 91.

2. **LOSS OF BAGGAGE: JOINT OWNERSHIP: RECOVERY.** Plaintiffs were the joint owners of a chest, but owners in severalty of the articles therein contained. They shipped it as baggage on defendant's road, and a check was issued to them jointly therefor. The chest and contents were lost, and plaintiffs brought their joint action to recover therefor. *Held* that, by issuing the check to plaintiffs jointly, the company entered into a joint contract with them, and that it could not insist that the contract should be severed, and separate actions brought thereon, to correspond with the ownership of the property. See Code, § 2544. *Anderson v. Wabash, St. L. & Pac. R'y Co.*, 131.
3. **CONDEMNATION OF RIGHT OF WAY: NOTICE TO TAX PURCHASER.** The rights of a purchaser at tax sale are not extinguished by *ad quod damnum* proceedings to which he has not been made a party by proper notice. *Garmoe v. Sturgeon*, 147.
4. **CONTRIBUTORY NEGLIGENCE: AVOIDANCE OF BY PLAINTIFF: EVIDENCE: INSTRUCTION.** In an action for personal injury on a railroad, an instruction which held, in substance, that, if the plaintiff showed what his *acts* were, and they did not appear to be negligent, the jury would be justified in finding that he was free from negligence, while not correct as an abstract statement of the rule, was not erroneous in this case, where it was clear that plaintiff was not guilty of contributory negligence, unless it was by reason of something which he did. *Raymond v. Burlington, C. R. & N. R'y Co.*, 152.
5. ———: **ACTS OF COMMISSION AND OMISSION: EVIDENCE: BURDEN OF PROOF.** Where in such a case there is no evidence of contributory negligence on plaintiff's part by reason of any omission, and no question in regard to the surrounding circumstances, and the only inquiry is as to whether the injured person, in view of the conceded circumstances, was negligent in what he did, and, upon proof of his *acts*, it appears that he was not guilty of any negligence in what he did, the burden of proof is shifted upon defendant, if it claims that plaintiff was negligent, to establish it. *Id.*
6. **RIGHT OF WAY: VILLAGE AND FARM LAND ADJOINING: DAMAGES.** Where plaintiff owned a tract of land, partly within and partly without the limits of a city, and a part of the land was adapted to cultivation only, and another part was adapted for use as suburban residence property, and the defendant condemned a right of way for its road across that portion of the land adapted to suburban residences, and plaintiff appealed to the circuit court, where she claimed that the portion of the tract crossed by the railroad was specially valuable, not as farm land, but as property suitable for suburban residences, *held* that, since, on her own theory, the two portions of the tract were adapted to different uses, and were, in effect, devoted to different objects, they could not be regarded as constituting one property, and that she could not recover for damage to the whole tract, but only for the damages resulting to that portion of the tract which was shown to be adapted to suburban residences. *Haines v. St. Louis, Des Moines & N. R'y Co.*, 216.
7. **DILIGENCE REQUIRED OF: BRAKEMAN FALLING THROUGH BRIDGE.** Railroad companies, in providing for the safety of their employes, are not required to anticipate and guard against every possible danger, but only

such as are likely to occur. And, while it may be anticipated that trains will have to be stopped in certain emergencies at unusual places, and that employes will be required to go upon the track at such places, yet it cannot be anticipated at *what* places such emergencies will arise; and the company is not required, in view thereof, to have its whole track so guarded as to prevent accidents to employes in such emergencies. Such hazards pertain to the nature of the business, and are assumed by the employe. So *held*, in this case, where defendant's train was stopped, in the night time, at an unusual place, on a bridge in process of repair, and plaintiff's intestate, a brakeman, in passing along the track, in the performance of his duty, stepped through the bridge and was killed. *Koontz v. Chicago, R. I. & P. R'y Co.*, 224.

8. INJURY TO SHOVELER BY FALLING BANK: NEGLIGENCE: LIABILITY. Where plaintiff's intestate had been for a long time engaged with others in removing a bank of earth, by repeatedly undermining the same, so as to bring the earth down from above, and he must have known as well as anyone the danger attending the work, and he made no objection to the method of doing the work, and he was finally killed by the sudden falling of earth upon him, *held* that plaintiff had no ground for recovery on account thereof against the defendant. *Rasmussen v. Chicago, R. I. & P. R'y Co.*, 236.
9. FIRES FROM ENGINE: MEANS USED TO PREVENT: EVIDENCE. Where defendant was charged with negligence in the construction and use of a locomotive, whereby damage by fire resulted to plaintiff it should have been allowed to show why a netting finer than the one actually used by it to prevent the escape of sparks could not be used without interfering with the working capacity of the locomotive. *Carter v. K. C., St. J. & C. B. R'y Co.*, 287.
10. INJURY TO EMPLOYE BY CO-EMPLOYEE: NEGLIGENCE: LIABILITY: STATUTE APPLIED. An employe of a railroad company whose duty it is to wipe engines, open and close the doors of an engine-house, and remove snow from a turn-table and connecting tracks, is not, by reason of such duties, in any proper sense employed in the operation of the railroad, within the meaning of section 1307 of the Code: and for an injury received, while performing such duties, through the negligence of a co-employe, he cannot recover against the company, under the provisions of said section, notwithstanding he may have other duties to perform which do pertain to the operation of the road. *Deppe v. C., R. I. & P. R'y Co.*, 36 Iowa, 52, distinguished, as having been decided under a different statute. *Malone v. Burlington, C. R. & N. R'y Co.*, 417.
11. RIGHT-OF-WAY DAMAGES: CHOICE OF REMEDIES BY LAND-OWNER. One whose land is taken for right of way by a railroad company, without compensation, is not confined to the statutory remedy provided for the assessment of his damages, but he may maintain an action for trespass. *Rush v. B., C. R. & N. R'y Co.*, 57 Iowa, 201, followed. *Birge v. Chicago, M. & St. P. R'y Co.*, 440.
12. RIGHT OF WAY: CONDEMNATION: NOTICE MUST NAME OWNER. Section 1247 of the Code requires that a notice by publication for the condemnation of right of way for a railroad must be addressed *by name* to the person whose land is to be taken or affected, and an owner not so named will not be bound by a notice addressed to "all other persons having any interest in or owning any portion" of the land. *Id.*
13. INJURY TO EMPLOYEE: SETTLEMENT BY AGREEMENT TO HIRE EMPLOYEE AS BAGGAGE-MAN AND EXPRESS MESSENGER: DUTY OF COMPANY. Plaintiff was injured on defendant's road, and, in settlement of a suit growing thereout, defendant agreed to employ him as baggage-man and express messenger at certain monthly wages. Plaintiff now sues for a

breach of that contract, and defendant answers that he was not competent to perform the duties of such employment. *Held* that defendant was bound to afford plaintiff a fair opportunity to acquire the necessary knowledge and skill in the manner in which they are ordinarily acquired by men in that service. *Moore v. Chicago, B. & Q. R'y Co.*, 505.

14. ———: ———: **WRONGFUL DISCHARGE.** In such case, if defendant, after plaintiff had entered into its service under the contract, wrongfully discharged him, this was as certainly a refusal by it to furnish him the employment agreed upon as its refusal to permit him to enter its service would have been. *Id.*
15. ———: ———: **RIGHT TO DISCHARGE FOR INCOMPETENCY.** In such case, if plaintiff, after entering upon the service agreed upon, was found, after a fair trial, to be incompetent for want of qualification mentally, or if he proved to be weak or infirm bodily, or was too slow, and could not discharge his duties in proper time, then the defendant might rightfully discharge him, and would not be liable therefor. *Id.*
16. **FAILURE TO CONSTRUCT CATTLE-GUARDS: DAMAGES: SUFFICIENCY OF PETITION.** Plaintiff's petition in this case considered, (see opinion,) and found to show upon its face that he had sustained some damages by reason of defendant's neglect of its legal duty to construct cattle-guards where its road entered and left plaintiff's farm, and *held* that the amount of such damages was a proper question for the jury upon the evidence, and that a demurrer to the petition was erroneously sustained. *Raridon v. Cent. Iowa R'y Co.*, 640.
17. **CODE, § 1309: CONSTITUTIONALITY: SPECIAL LEGISLATION.** Section 1309 of the Code, which provides that a judgment against any railway corporation for any injury to any person or property shall be a lien on the company's property, prior and superior to the lien of any mortgage or trust deed executed since the fourth day of July, 1862, *held* not to be repugnant to § 6, article 1, or § 12, article 8, of the constitution of Iowa, nor to the fourteenth amendment to the constitution of the United States, as being special legislation. Compare *Bucklew v. Central Iowa R'y Co.*, 64 Iowa, 603. *Central Trust Co. v. Sloan*, 655.
18. **UNLAWFUL SPEED IN CITY: PERSONAL INJURY: PROXIMATE CAUSE: QUESTION FOR JURY.** Although it appears that the plaintiff in this case, who was employed in cleaning ice and snow from defendant's track, saw the car coming by which he was struck, and had got out of its reach, but, on account of slipping and falling, he was struck and injured, yet, where the evidence further showed that the car was moving at a rate of speed forbidden by the ordinances of the city in which the accident occurred, *held* that it could not be said as a matter of law that the unlawful rate of speed was not the proximate cause of the injury, and that the trial court properly submitted that question to the jury. *Crowley v. Burlington, C. R. & N. R'y Co.*, 658.
19. **MEASURE OF DILIGENCE REQUIRED OF EMPLOYEE IN WATCHING FOR CARS.** An employee working at his post on a railroad is not held to the same measure of diligence in looking for approaching trains as a traveler who is about to cross the track. *Id.*
20. **ORDINANCE REGULATING SPEED: CONSTRUCTION OF.** An ordinance regulating the speed of railway trains in a city should not by construction be limited in its application to those portions of the city used by the public. Such ordinances apply to switch-yards as well. *Id.*
21. **PERSONAL INJURY: NEGLIGENCE: PLEADING: EVIDENCE: INSTRUCTION.** In an action for a personal injury to an employee through the negligence of a railway company, it is not necessary to allege that,

though plaintiff was negligent, yet the defendant might have avoided the injury by the exercise of reasonable care, in order to justify the admission of evidence and an instruction based on that theory. *Id.*

22. **RIGHT OF WAY DEED: AGREEMENT TO FENCE, ETC.: CONSIDERATION.** Where a deed conveying a right of way for a railroad for a certain named sum contained an agreement on the part of the company to fence the right of way and build crossings, *held* that this agreement formed a part of the consideration for the right of way. *Hull v. Chicago, B. & P. R'y Co.*, 713.
23. ———: ———: ———: **MEASURE OF DAMAGES FOR FAILURE TO PERFORM.** In such case, for a failure on the part of the company to build the fence and put in the crossings as agreed, the measure of damages is the difference in the rental value of the land. *Varner v. St. Louis & C. R. R'y Co.*, 55 Iowa, 677, followed. *Id.*
24. ———: ———: ———: **DAMAGES FOR FAILURE, AND FOR TRESPASS AND NEGLIGENCE: RIGHT TO LIEN.** Where plaintiff obtained judgment against the defendant company for breach of an agreement, contained in a right of way deed, to fence and build crossings along and over the right of way, he was entitled to a lien therefor upon the property of the company; but he was not entitled to a lien for judgment on account of trespass, nor for a judgment on account of negligence in constructing the road, whereby the premises were overflowed. *Id.*
25. **RAILROAD IN COAL MINE: SWITCH ON GRADE: NEGLIGENCE NOT PRESUMED.** Proof that a switch-track in a coal mine was built upon a grade, does not of itself tend to establish negligence on the part of the proprietor of the mine in so building it, for it may not have been possible to build it otherwise; (Compare *Foley v. Chicago, R. I. & P. R'y Co.*, 64 Iowa, 651;) and an instruction in this case, based on a contrary theory, was erroneous. *Heath v. Whitebreast Coal & Mining Co.*, 737.
26. **HORSE-RAILWAYS IN STREETS: COMPENSATION TO LOT-OWNERS: CODE, § 464.** Section 464 of the Code makes a distinction between railways proper and street railways,—the former being such as are operated by steam, and the latter those operated by horses; and under that section it is only when a railway operated by steam is built along a street that an abutting lot-owner is entitled to damages. Such right does not arise upon the construction of a railway operated by horses. *Sears v. Marshalltown Street R'y Co.*, 742.
27. **AS CARRIERS OF PASSENGERS: DEGREE OF DILIGENCE REQUIRED.** It is the duty of a common carrier of passengers to exercise extraordinary care and caution for the safety of its passengers. *Raymond v. Burlington, C. R. & N. R'y Co.*, 152.
28. **TAX IN AID OF: FIVE PER CENT LIMIT: SECOND TAX WHEN FIRST ONE ABANDONED: STATUTE CONSTRUED.** See Taxation, 2.
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1. OF COINS FROM PERSON. See Criminal Law, 23.

SALE.

1. **OF CHATTELS: POSSESSION: LOAN TO SELLER: NOTICE: CODE, § 1923.** A sale of personal property, accompanied with delivery and possession, may be valid, without the general public's having any knowledge upon the subject, and without the sale's being evidenced by any written, acknowledged and recorded instrument. (Code, § 1923.) All that the statute requires is that there shall be such a change of possession as shall give to parties dealing with the seller or buyer notice of the transaction. Accordingly, where one in good faith purchases chattels and takes possession thereof, he may afterwards loan or hire them to the seller without making them subject to attachment for the seller's debts. *Deere & Co. v. Needles*, 101.
2. **CONDITIONAL SALE OF CHATTEL: CODE, § 1922: "ACTUAL POSSESSION" OF VENDEE: WHAT IS NOT.** So long as an article sold upon condition, and shipped to the vendee by rail, is in the hands of the railroad company, subject to the company's charges for freight, and to the vendor's right of stoppage *in transitu*, it cannot be said to be in the "actual possession" of the vendee, as those words are used in section 1922 of the Code; and in such case, a third person who buys the article from the vendee, and obtains possession of it from the railroad company, takes it subject to the condition on which it was first sold, even though the conditional sale was not made a matter of record, as provided in said section. *Warner v. Johnson & Hakeman*, 126.
3. **PLACE OF CONTRACT: INTOXICATING LIQUORS: CODE, § 1550.** Where orders for liquors were sent by defendant from Vermont to plaintiffs in New York by mail, and where other orders were taken by plaintiffs' agent in Vermont, but sent by him to plaintiffs in New York, to be accepted or rejected by them at pleasure, and the liquors were consigned to defendant by rail, he paying the carrier's charges thereon, *held* that the contracts were consummated in New York, and were not in violation of the laws of Vermont in regard to the sale of such goods, and that recovery may be had thereon in this state, notwithstanding section 1550 of the Code. *Tegler v. Shipman*, 33 Iowa, 194, followed. *Engs & Sons v. Priest*, 232.
4. **OF MACHINE: FAILURE OF WARRANTY: CHOICE OF REMEDIES: DAMAGES: EVIDENCE: PRACTICE IN SUPREME COURT.** The vendee of personal property which has been sold with warranty as to its quality, has the election, on the failure of the warranty, to rescind the contract by returning the property and demanding back the consideration received by the vendor, or to retain the property and sue for the damages sustained in consequence of the failure. (See cases cited in opinion.) But where he elects to keep the property, and he is sued for the contract price, he must pay that price, less the amount of the damages which, by a preponderance of the evidence, he shows that he has sustained; and where he fails so to establish the extent of his damages, he is entitled to only nominal damages; and in such case a judgment against him for the whole contract price will not be disturbed on appeal, as this court will not remand a case for the assessment of merely nominal damages. *Case Threshing Machine Co. v. Haven*, 359.
5. ———: ———: **MEASURE OF DAMAGES.** The measure of the vendee's damages in such case is the difference between the value of the property as it actually was, and what its value would have been had it been as warranted. (See cases cited.) *Id.*
6. ———: ———: **VALUE OF MACHINE: JUDICIAL NOTICE OF.** Where in such a case the only evidence of the actual value of the machine was that of the vendee, who testified only that it was of no value, and the machine in question was a steam threshing-machine, *held* that such tes-

timony could not be taken as true, because the court will take judicial notice that such a machine is of some value, though possibly useless for the purpose for which it was designed. *Id.*

7. **INDUCED BY FRAUD OF VENDEE: DELIVERY: RESALE BY VENDEE: RECOVERY OF GOODS.** Plaintiffs sold the goods in question to A., who obtained credit therefor by falsely representing that his name was S. The goods were consigned by rail to the name of S., but A., by stating that he was the purchaser, induced the station agent to deliver them to him. A. then sold and delivered the goods to D. and P., who had no knowledge of the fraud. *Held* that the delivery of the goods to A. by the carrier was in effect a delivery by the plaintiffs, and that plaintiffs, having thus voluntarily delivered the goods to A., thereby enabling him to sell to D. and P., could not recover the goods from D. and P., who purchased them in good faith. *Perkins & Gray v. Anderson*, 398.
8. **DELIVERY: QUESTION FOR JURY.** Whether there was a delivery in pursuance of the oral contract of sale in this case was properly submitted to the jury. *Campbell v. Ormsby*, 518.
9. **OF BARLEY BY SAMPLE: WARRANTY: FACTS CONSTITUTING: DIVISIBLE CONTRACT: RESCISSION OF.** Plaintiffs sold to defendants ten car-loads of barley, like sample, to be delivered from time to time on track at C., for transportation to D., where defendants resided. Defendants were to pay seventy cents per bushel for each car-load when so delivered. Defendants had never seen the barley. Upon receipt of the first car-load, defendants refused to pay for same, because it was not equal to sample, but informed plaintiffs that they had given them credit for sixty-five cents per bushel therefor, and that they would withhold payment until the ten car-loads were delivered. They also urged them to ship the remainder of the barley, and promised to honor their drafts for future shipments. Plaintiffs refused to ship any more barley on the terms proposed, but offered to continue the shipments if the first car-load was paid for. *Held* (1) that the contract amounted to an express warranty that the barley should be equal to the sample; (2) that the contract was severable, and that the refusal to pay for the first car-load did not entitle plaintiffs to rescind, and to refuse to deliver the other car-loads; (3) that plaintiffs were entitled to recover for the actual value of the car-load delivered, and that defendants were entitled, on their counter-claim, to recover damages for the failure to deliver the other nine car-loads. *Myer & Dostal v. Wheeler & Co.*, 390.
10. **WITH AND WITHOUT WARRANTY: EFFECT OF KEEPING INFERIOR GOODS.** Where goods are sold without warranty, to be paid for on delivery, and the goods prove inferior, if the vendee elects to keep them, he must pay the contract price; but, if sold with warranty as to quality, and the warranty fails, the vendee may keep the goods, and, when sued for the contract price, may by way of counter-claim set up and recover his damages for the failure of the warranty. See authorities cited in opinion. *Id.*
11. **DIVISIBLE CONTRACT: RESCISSION FOR BREACH.** The rescission of a divisible contract will not be allowed for a breach thereof, unless such breach goes to the whole consideration. See authorities cited in opinion. *Id.*
12. **FOR FUTURE DELIVERY: FAILURE TO DELIVER: MEASURE OF DAMAGES.** Where grain was sold to be delivered in the future, the measure of damages for non-delivery was the highest market price at the place of delivery between the date when it should have been delivered and the date of beginning suit to recover the damages. *Id.*

13. **DELIVERY TO CARRIER: BILL OF LADING TO VENDOR: ASSIGNMENT TO AND PAYMENT BY VENDEE WHILE GOODS ARE IN TRANSITU: WHEN TITLE PASSES: RISK OF DAMAGE.** Where a vendor delivered goods to a carrier for transportation, and took a bill of lading to himself, which he endorsed in blank, and attached to a sight draft on the vendees, and then deposited the bill of lading with the draft in the bank, and got credit on his bank account for the amount of the draft, and, the draft and bill of lading being forwarded, the vendees paid the draft and accepted the endorsed bill of lading while the goods were yet *in transitu*, *held* that the goods were not delivered, and that the title did not pass, until the bill of lading had been delivered to the vendees; but that, after that time, in the absence of a contract to the contrary, the risk of damage to the goods by the elements was assumed by the vendees. *Forcheimer & Co. v. Stewart*, 593.
14. **OF GOODS BY AGENT TO BE DELIVERED: WARRANTY AS TO QUALITY: FACTS CONSTITUTING.** Where defendant, in Council Bluffs, Iowa, appointed a broker in Mobile, Alabama, to sell hams, and the agent took plaintiffs' order for "choice, sugar-cured, canvassed hams," and plaintiffs had no opportunity to inspect the hams, but they were to be shipped from Council Bluffs, and defendant shipped the same and demanded and received payment therefor while they were in transit, *held* that the facts amounted to a warranty that the hams shipped were "choice, sugar-cured, canvassed hams." *Id.*
15. **UPON ORDER GIVEN TO AGENT: FAILURE OF AGENT TO TRANSMIT CONDITION AS TO WARRANTY: LIABILITY OF PRINCIPAL.** Where plaintiffs' agent, who was authorized to take orders for wagons and carriages and transmit them to plaintiffs, took defendants' order, but defendants, not being content with plaintiffs' printed and published warranty, demanded a further warranty, whereupon a warranty was written out by the agent in duplicate, one copy of which was left with the defendants, and the other of which the agent agreed to forward with the order to his principals, for their acceptance or rejection; and he sent the order, but failed to send the warranty, and plaintiffs forwarded the wagons and carriages without any knowledge of the written warranty, and the goods did not fulfill the conditions thereof, *held* that plaintiffs were liable to the same extent as if the goods had been sold by them upon that warranty. *Davis, Gould & Co. v. Danforth & Co.*, 601.
16. **OF GOODS TO BE COMPLETED: RESCISSION: FACTS NOT ENTITLING TO.** Where defendant entered into an absolute agreement to pay a certain price for a granite monument, to be completed, inscribed and erected according to the terms of the contract, she had no right to rescind the contract; and though she notified the vendors before the monument had been inscribed or erected that she would not take it, yet it was their right to complete and erect it according to their agreement, and upon doing so they were entitled to recover the contract price. *McAllister v. Safley*, 719.
17. **VENDOR BOUND BY STATEMENTS OF FRIEND MADE IN HIS PRESENCE.** See Evidence, 22.

SCHOOLS.

See PUBLIC SCHOOLS.

SCHOOL DISTRICTS.

SCHOOL DISTRICTS.

1. **CHANGE OF BOUNDARIES: MANDAMUS TO COMPEL DIRECTORS TO ACT ON PETITION FOR.** Where plaintiff and others, residents of the district township of M., petitioned the directors of said district, and also the

directors of the adjoining independent district of E., to have certain territory in which they lived detached from the district township and attached to the independent district, and the directors of the independent district had acted favorably to the petitioners, but the directors of the district township refused to act at all, *held that mandamus would lie to compel them to act in the premises. Ilightower v. Ocerhauiser, 347.*

2. ———: ———: ESTOPPEL: FACTS NOT CONSTITUTING. In such case, plaintiff was not estopped by the fact that a year before he had presented a similar petition to the same board, and that they then took action thereon, refusing to change the boundaries, and that he failed to appeal from such decision, as he might have done, though the location of the school-houses in his district remained the same. *Id.*
3. INDEPENDENT DISTRICTS: DIRECTORS CANNOT CHANGE BOUNDARIES OF. *Eason v. Douglass, 55 Iowa, 390, followed. Ind. Dist. of Mt. Vernon v. Ind. Dist. of Harris Grove, 590.*

SCHOOL TEACHER.

See PUBLIC SCHOOLS.

SHERIFF.

See OFFICER.

SLANDER.

1. JUSTIFICATION OF WORDS CHARGING A CRIME: MEASURE OF PROOF: CASES OVERRULED. In an action of slander for charging plaintiff with the commission of a crime, when the defendant justifies, it is sufficient if he prove by a preponderance of the evidence that plaintiff did commit the crime charged—following the principle of *Welch v. Jugenheimer, 56 Iowa, 11.* The cases of *Bradley v. Kennedy, 2 G. Greene, 231; Forshee v. Abrams, 2 Iowa, 571; Fountain v. West, 23 Id., 9, and Ellis v. Lindley, 38 Id., 461*, holding that the commission of the crime in such cases must be established beyond a reasonable doubt, are overruled. *Riley v. Norton, 306.*

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STATUTES CITED, CONSTRUED, ETC.

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 " 1. " 11. Criminal law: Jurisdiction of justices: Intoxicating liquors, 16.
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STATUTE OF FRAUDS.

1. CONTRACT FOR PARTNERSHIP TO BUY AND SELL LANDS. A parol agreement for the creation of a partnership for the purpose of buying and selling certain lands, is not an agreement for the transfer of the title to lands, and is not within the statute of frauds. *Richards v. Grinnell*, 63 Iowa, 44, followed. *Pennybacker v. Leary*, 220.
2. PROMISE TO PAY ANOTHER'S DEBT: FACTS SHOWING NO CONSIDERATION. Where plaintiff had a claim and a right to a mechanic's lien against M. & N., and defendants promised that if he would not commence proceedings, nor file any mechanic's lien to secure his claim, before a certain date, they would pay the claim, and plaintiff accepted the proposition, and defendants then paid part of the claim, but refused to pay the remainder when it became due by the terms of the proposition, but plaintiff neither released the original debtor nor relinquished his right to a lien, *held* that plaintiff parted with nothing in consideration of defendants' promise, and the promise, being to pay the debt of another, and not being in writing, was within the statute of frauds, and could not be established by oral testimony. *Vaughn v. Smith*, 579.

3. PRACTICE IN TAKING ADVANTAGE OF THE STATUTE. See Evidence, 17.
4. AGREEMENT TO PAY ANOTHER'S DEBT. See Letter of Credit, 2.

STATUTE OF LIMITATIONS.

1. ADVERSE POSSESSION OF LANDS. Twenty years' possession of land, under a claim of absolute title, which possession and claim were known to defendants, bars any right which the defendants may have had to assert an interest in the land. *Williams v. Thomas*, 183.
2. NOT ENLARGED BY DISMISSION WITHOUT PREJUDICE. Section 2844 of the Code, providing that an action may be dismissed before final submission, without prejudice to a further action, does not have the effect to enlarge the statute of limitations as to such action. *Archer v. Chicago, B. & Q. R'y Co.*, 611.
3. ACTION FOR PERSONAL INJURY: DISMISSION WITHOUT PREJUDICE: CODE, § 2537. Where plaintiff began an action for personal injury in the state court, which defendant had removed to the federal court, and plaintiff then had it dismissed without prejudice, on the ground that he believed that he could not obtain a fair trial in the federal court, *held* that a new action for the same cause, begun more than two years after the cause of action accrued, but less than six months after the first action was dismissed, was barred by section 2529 of the Code, and that section 2537 did not save it. *Id.*
4. ACTION, WHEN BEGUN: HANDING NOTICE TO SHERIFF: INTENTION OF SERVICE ABANDONED. Although the delivery of an original notice to the sheriff, with intent that it shall be served immediately, is a commencement of the action for the purposes of the statute of limitations, (Code, § 2532,) yet such intent must be *continuous* until the service is effected. And so, where a notice was placed in the sheriff's hands, who neglected to serve the same, but afterwards returned it to plaintiff's attorney, who lost it, and nearly two years later another notice was drawn and served, and the defendant thus brought into court, *held* that the action was not begun with the delivery of the first notice to the sheriff, and that, the period prescribed by the statute of limitations having expired before the second notice was placed in the sheriff's hands, the action was barred. *Wolfenden v. Barry*, 653.
5. AS A BAR TO CLAIM AGAINST WIFE FOR FAMILY EXPENSES. See Husband and Wife, 1.
6. IN TAX-TITLE CASES. See Landlord and Tenant, 3; Tax Sale and Deed, 6; Tax Title, 1, 2.
7. ADVERSE POSSESSION OF LAND. See Title, 2.

STOCK AT LARGE.

1. MEANING OF WORD STOCK: RELEASING SWINE FROM DISTRAINT. See Criminal Law, 24.

STREETS.

1. COMMON LAW DEDICATION OF: WHAT IS NOT: DUTY OF CITY TO KEEP IN REPAIR: CONTROL OF BY GENERAL ASSEMBLY. See Cities and Towns, 1, 2, 3.
2. RAILWAYS ON STREETS: RIGHT OF LOT-OWNERS TO DAMAGES. See Railroads, 26.

SUBORNATION OF PERJURY.

1. INFERENCE AGAINST SUBORNER. See Evidence, 13.

SUPREME COURT.

1. JURISDICTION: APPEAL ON CERTIFICATE OF TRIAL JUDGE. Where the amount in controversy does not exceed \$100, this court has no jurisdiction to determine any question not certified by the trial judge. *Ardery v. Chicago, B. & Q. R'y Co.*, 723.
2. ———: AMOUNT IN CONTROVERSY: HOW DETERMINED: COSTS. It is the amount in controversy, *as shown by the pleadings*, which determines the jurisdiction of this court; and where a cause comes from the circuit court which has been appealed from a justice's court, the costs made before the justice do not enter into the amount in controversy. *Id.*
3. JURISDICTION: AMOUNT INVOLVED: PRESUMPTION IN FAVOR OF JURISDICTION. See Appeal, 2.
4. NO JURISDICTION WHERE RECORD SHOWS NO JUDGMENT BELOW. See Appeal, 4; Criminal Law, 42.
5. JURISDICTION: AMOUNT IN CONTROVERSY. See Appeal, 7, 8.
6. NO JURISDICTION TO TRY DE NOVO ON APPEAL FROM JUDGMENT IN SUMMARY PROCEEDINGS. See Appeal, 9.

SURETY.

See PRINCIPAL AND SURETY.

SURPRISE.

1. OBJECTION ON ACCOUNT OF CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL. See Practice in Supreme Court, 22.

TAKING PRIVATE PROPERTY.

See CONSTITUTIONAL LAW, 1, 2.

RAILROADS, 3, 6, 11.

TAXATION.

1. MONEYS AND CREDITS: WHERE TAXED: CHANGE OF OWNER'S RESIDENCE: EVIDENCE TO ESTABLISH. Moneys and credits are taxable only in the county of the owner's residence. For evidence which is held sufficient to establish the change of plaintiff's residence from the county in which he was taxed, see opinion. *Babcock v. Twp. Board of Equalization*, 110.
2. TAX IN AID OF RAILROAD: FIVE PER CENT LIMIT: SECOND TAX WHEN FIRST ABANDONED: STATUTE CONSTRUED. Where in 1877 a certain township voted a five per cent tax in aid of a certain railroad, which was duly levied by the supervisors, and entered on the tax books, and in December, 1878, the electors of the township voted another five per cent tax in aid of another railroad, and in May, 1879, the directors of the first railroad company rescinded and abandoned the tax voted in its favor, and in June following the supervisors canceled said tax, and in September following levied the tax in aid of the second railroad, *held* that the second tax was not void as being in violation of the provision of the statute (Sec. 3, chapter 123, Laws of 1876) to the effect that the

aggregate of such tax "to be voted or levied" should not exceed five per cent of the assessed value of the property of the township; because, construing the statute with reference to its purpose, the word "or" in the quoted clause should be construed as *and*, and before the second tax was voted and levied, the first levy had been set aside. *Williams v. Poor*, 410.

3. **WHEN LEVIED: PRESUMPTION.** The statute requires taxes to be levied in September, and it will be presumed in a particular case that the levy was made in that month. *Adams v. Snow*, 435.
4. —: **ASSESSMENT: CHANGE OF NAME BY AUDITOR.** When the county auditor, in transcribing the assessment roll, finds land taxed to one not the owner, he has authority, under § § 837, 841, of the Code, to substitute the name of the owner as shown by the plat book in his custody, and such assessment to the owner is notice to a purchaser at tax sale that the land is taxed to the owner. *Id.*
5. **DUE PROCESS OF LAW: RIGHT OF TAX-PAYER TO NOTICE AND HEARING.** See Constitutional Law, 8, 5.

TAXES.

1. **REBATE AFTER PAYMENT, UNDER CODE, § 800: AUTHORITY OF TREASURER TO REFUND.** Where the board of supervisors rebates a tax for any of the reasons named in § 800 of the Code, and the tax has been paid when such rebate is made, the county treasurer has no authority to refund such tax without an order to that effect from the board of supervisors. Whether a warrant from the auditor would not also be necessary, *quaere*. *Crosby v. Floete*, 370.

TAX SALE AND DEED.

1. **TIME FOR REDEMPTION: NOTICE: POSSESSION.** Where, at the end of three years after the sale of land for taxes, the land is both unoccupied and taxed to no one, the purchaser is entitled to a deed therefor, without giving any notice to the owner of the expiration of the time for redemption; (*Fuller v. Armstrong*, 53 Iowa, 683; *Tuttle v. Griffin*, 64 Id., 455;) and such deed will be good, though made pursuant to a notice published several years later, when the land was both occupied by and taxed to the owner. *Meredith v. Phelps*, 118.
2. **PAYMENT BEFORE SALE: FACTS NOT CONSTITUTING: APPLICATION OF PAYMENT: MISTAKE.** Where one, through his agent, paid the taxes on his land assessed to another, and the agent, conceiving that he had paid on the wrong land, afterwards had the treasurer apply the payment to other land, and the tax receipts and books were changed accordingly, so as to show the taxes unpaid on the land to which the payment was first credited, and the facts were such that it must be presumed that the principal had knowledge of the change made by his agent, and acquiesced therein, *held* that there was no such payment of the taxes on his land as would defeat a sale thereof for those taxes, and a deed made pursuant thereto. *Maxwell v. Hunter*, 121.
3. **NOTICE TO REDEEM: WHEN NOT NECESSARY TO VALIDITY OF DEED: PRESUMPTION ARISING FROM DEED.** When land sold for taxes is unoccupied and taxed as unknown at the time when notice of the expiration of the time for redemption should be given, there is no person on whom the notice can be served, as required by statute, and, in such case, the treasurer is authorized to execute a deed to the tax purchaser without the service of such notice; (following cases cited in opinion;) and after such deed is made, it must, under the statute, be presumed, in the absence of a contrary showing, that the facts were such that no such service was required. *Garmoe v. Sturgeon*, 147.

4. ———: WHO ENTITLED TO: RAILROAD COMPANY. Where, after land has been sold for taxes, a railroad company condemns (though without notice to the tax purchaser) and takes possession of a right of way over the land, it is entitled to redeem from the tax sale, and to personal service of notice to redeem, and it is not affected by a tax deed made without such notice. *Id.*
5. PUBLISHED NOTICE TO REDEEM: TO WHOM DIRECTED. Where land has been sold for taxes, and, when the notice to redeem is given, it is taxed by mistake in a wrong name, and the notice is given by publication only, it must be directed to the person in whose name the land is taxed. If addressed to another, though that other be the real owner, a tax deed issued pursuant thereto will be invalid. *Hillyer v. Farneman*, 227.
6. TAX SALE: REDEMPTION FROM: AMOUNT TO BE PAID: STATUTE OF LIMITATIONS. One who has a right to redeem from a tax sale must pay all taxes paid by the purchaser within five years prior to the commencement of the suit to redeem, with interest and penalties provided by law; but the right of recovery for all sums paid before that time by the purchaser for taxes and upon tax sales is barred by the statute of limitations, and need not be paid in redemption. *Thode v. Spofford*, 294.
7. ———: PAYMENT OF SUBSEQUENT TAXES BY PURCHASER: FILING DUPLICATE RECEIPT WITH AUDITOR: CODE, § 889. The provision of § 859 of the Code, requiring a purchaser at tax sale, upon paying subsequent taxes, to file with the auditor the duplicate tax receipt, in order to recover the tax upon redemption of the land, does not apply to one who has procured his tax deed, and pays taxes on the land as owner thereof. *Id.*
8. NOTICE TO REDEEM: PRESUMPTION THAT LAND IS TAXED TO OWNER. Where defendant's title to the land in question was of record, and the land was assessed and taxed to him at the time it was sold for taxes, it will be presumed, in the absence of a contrary showing, that he retained the title and that it was taxed to him when the notice to redeem should have been given; and especially should such presumption be entertained against a holder of the certificate of purchase who, by his acts in the premises, recognized the continued ownership of the defendant. In such case a tax deed cannot be sustained without the statutory proof that notice to redeem was served on defendant. *Fuller v. Armstrong*, 53 Iowa, 683, distinguished. *Ellsworth v. Cordrey*, 303.
9. TAX DEED: LEVY OF TAXES TO SUPPORT: EVIDENCE OF. The provision of section 38, chapter 152, Laws of 1858, that the levy of taxes, when made, should be recorded "in the proper book," was directory only; and where no such entry was made in the proper book, but a sufficiently full record of the levy, signed by the officers whose duty it was to make the same, was found among the old papers in the auditor's office, such papers were competent evidence of the levy, in support of a tax deed based upon a sale for the taxes so levied. *Higgins v. Reed*, 8 Iowa, 298, followed. *Prouty v. Tallman*, 354.
10. NOTICE TO REDEEM: PERSON TO WHOM LAND IS TAXED: STATUTE CONSTRUED. When the person to whom land is to be taxed has been ascertained and made of record by the assessor, and his book has been returned to the county auditor, the land is to be regarded as taxed to that person, within the meaning of section 894 of the Code, and from the time of the assessor's return until the tax duplicate is delivered to the treasurer, the auditor's office is the place to learn to whom the land is taxed; and the person to whom the land is thus taxed is entitled to the notice to redeem provided by said section. Until the assessor's return is made, the land is to be presumed to be taxed to the same person

as the year before. Original opinion, 63 Iowa, 686, adhered to. *Heaton v. Knight*, 434.

11. NOTICE TO REDEEM TO PERSON TO WHOM LAND IS ASSESSED. The person to whom land is assessed when notice of the expiration of the time for redemption from tax sale should be given, is the person to whom it is "taxed," within the meaning of section 894 of the Code, and the right of such person to redeem cannot be cut off by a treasurer's deed made in the absence of such notice. *Heaton v. Knight*, 63 Iowa, 686, (S. C. ante, p. 434) followed. *Adams v. Snow*, 435.
12. REDEMPTION: TENDER. Where one seeks to redeem from a tax sale and deed, where the deed is void for want of the statutory notice to redeem, he is not required by § 897 of the Code to show that he has tendered to the holder of the deed the amount necessary to redeem the land. *Id.*
13. DEED WITHOUT NOTICE TO REDEEM: FACTS WARRANTING. Where land sold for taxes is taxed to unknown owners at the time of giving notice to redeem, and is not in the possession of any one, a tax deed may lawfully be made without such notice. *Fuller v. Armstrong*, 53 Iowa, 633, and subsequent cases, followed. *Walker v. Sioux City & Iowa Falls Town Lot Co.*, 563.
14. TAX DEED: RECITATION OF NOTICE TO REDEEM WHERE NONE WAS REQUIRED: ESTOPPEL. Where the law required no notice to redeem in order to the execution of a valid tax deed, but the deed nevertheless recited the giving of such notice, *held* that such recital did not estop the holder of the deed from denying the necessity of such notice. *Id.*
15. PURCHASE OF CERTIFICATE BY AGENTS OF LAND-OWNER: DEED TO AGENTS SET ASIDE. An agent who purchases a tax certificate upon the land of his principal holds it in trust for his principal, and he cannot be allowed to take and hold a tax deed as against his principal, on account of the negligence of the principal in reimbursing him, unless he has made a full and fair statement to his principal of the account between them, and of the amount necessary to reimburse him. In this case, as the statement made by the agents was both deficient and misleading, and was not made to the principal at all, but to another agent, not shown to have any authority in the matter, *held* that the tax deed under which the agents claimed should be set aside at the suit of the principal. *Continental Life Ins. Co. v. Perry & Townsend*, 709.
16. NOTICE TO REDEEM: POSSESSION: FACTS NOT AMOUNTING TO. A person cannot be said to have possession of land, so as to be entitled to notice to redeem from a tax sale, who has only plowed two furrows on the land to see how it would plow. *Stoddard v. Sloan*, 630.
17. —: USE OF INITIALS FOR GIVEN NAME. A published notice to redeem from a tax sale is not invalidated because only the initial letters of the given name of the person to whom the notice is addressed are used. *Id.*
18. —: DESCRIPTION OF LAND: JUDICIAL NOTICE OF TOWNSHIP AND RANGE. A notice to redeem from a tax sale which described the land as being the southeast quarter of section 5, township 89, range 47, in Woodbury county and state of Iowa, sufficiently described the land as to township and range, since the court will take judicial notice that there is only one township in that county answering to the description. *Id.*
19. —: AFFIDAVIT OF PUBLICATION: SUFFICIENCY: TIME OF PUBLICATION. The statute requires only three publications of a notice to redeem from a tax sale, and it is sufficiently complied with if the first publication is made after the lapse of two years and nine months from

the day of sale, and the service is completed ninety days before the execution of the deed. The affidavit of publication in this case accordingly, *held* sufficient. *Id.*

20. ———: ———: RESIDENCE OF PERSON NOTIFIED. The affidavit of publication in such case need not state that the person notified is a non-resident of the county, nor other facts necessary to justify service by publication. *Id.*
21. ———: ———: SUFFICIENCY OF JURAT. Where the affidavit of publication in such a case purported to be made by S., and his name was not only subscribed to it, but written in the body of it, and he states therein that he was sworn, and the jurat states that it was sworn to and subscribed before the notary whose name is attached, *held* sufficient to show that it was S. who was sworn, though his name does not appear in the jurat. *Id.*

TAX TITLE.

1. ACTION TO QUIET: STATUTE OF LIMITATIONS: EVIDENCE. An action to quiet a tax title cannot be defeated by the patent owner on the ground that it was not brought within five years after the recording of the tax deed, without showing that he or his grantors were in actual possession at the end of the five years. (*Moingona Coal Co. v. Blair*, 51 Iowa, 447; *Goslee v. Tearney*, 52 Id., 455.) *Maxwell v. Hunter*, 121.
2. RECOVERY OF LAND UNDER: STATUTE OF LIMITATIONS. Under section 790 of the Revision of 1860, an action upon a tax title, to recover the possession of land from the holder of the patent title, was barred after five years from the date when the tax deed could have been procured. *Thode v. Spofford*, 294.
3. ACQUISITION OF BY TENANT IN POSSESSION: STATUTE OF LIMITATIONS. See Landlord and Tenant, 3.

TENANTS IN COMMON.

1. RIGHT OF OCCUPANCY: LIABILITY TO ACCOUNT: ACTION IN PARTITION: RECEIVER. It is the right of a tenant in common to occupy the common property, and such occupancy alone does not render him liable for rent. But if the occupying tenant should refuse to allow his co-tenant to occupy with him, such refusal might be deemed an ouster, and in that case the occupying tenant may be held liable to account. It follows that, where the tenant in possession is occupying under such circumstances that he is not liable to account, such mere occupancy affords no ground for the appointment of a receiver, pending an action for partition. *Varnum v. Leek*, 751.

TENDER.

1. WRITTEN OFFER TO PAY UNDER CODE, § 2105: OFFER MUST BE WITHOUT CONDITION. "An offer in writing to pay a particular sum of money is equivalent to the actual tender of the money." Code, § 2105. But this statute simply dispenses with the actual production of the money. In other respects the rule of the common law prevails, which requires that a tender, to be good, must be unconditional. And so, where defendant herein made a written offer, which was in effect: "I am willing to pay you the named sum to avoid litigation; it is not due you, but I am willing to pay," *held* not sufficient to make the offer equivalent to a tender. *Kuhns v. Chicago, M. & St. P. R'y Co.*, 528.
2. NOT REQUIRED IN ACTION TO REDEEM FROM TAX SALE. See Tax Sale and Deed, 12.

TITLE.

1. TO REAL ESTATE: EVIDENCE: DEFECTIVE DEED: AUDITOR'S PLAT-BOOK TO AID. The county auditor's plat-book, contemplated by § 1950 of the Code, is not competent evidence to aid the defective description in a deed, by identifying the description and showing that it was well known,—it not being a published map or chart, within the meaning of § 3653 of the Code, nor a certified copy of any record, entry or paper belonging to a public office; as contemplated in § 3702 of the Code. *Heinrichs v. Terrell*, 25.
2. ———: DIVISION LINE AGREED UPON: POSSESSION: STATUTE OF LIMITATIONS. Where a division line is agreed upon by persons owning adjoining real estate, and possession is taken in accordance with such agreement, such possession must be regarded as adverse from the time it is taken, and if so held and continued for the period of ten years next succeeding, it will ripen into a perfect title, binding upon the parties and those claiming under them; and when such title is once acquired, continued actual possession is not necessary to preserve it. *Id.*
3. TO GOODS OBTAINED BY FRAUD AND RESOLD. See Sale, 7.
4. TO GOODS SOLD AND SHIPPED: WHEN TITLE PASSES. See Sale, 13.
5. OF LANDS BY ADVERSE POSSESSION. See Statute of Limitations, 1.
6. TO PROMISSORY NOTE OF ONE DECEASED. See Estates of Decedents, 1.

See TAX TITLE.

TOWNSHIP.

1. DIVISION OF: WHEN COMPLETED FOR PURPOSES OF ELECTIONS: TAX IN AID OF RAILROAD. In § 384 of the Code, relating to the division of a township containing a city or incorporated town, the words, "for election purposes" refer only to the election of officers for the new township; and, as the old township organization in such a case continues to exist until the first day of January following the order of the supervisors for the division of the township, all other elections to be held before the first day of January must be by the original township as it was before the division. So held in this case, where a tax in aid of a railroad was voted by the whole original township in December, prior to the January when the division of the township, previously ordered, took effect under the statute. *Williams v. Poor*, 410

TRESPASS.

1. ON LAND: PROOF OF TITLE NECESSARY TO RECOVERY. Where plaintiff in an action for trespass on land does not allege that he was in possession, but relies wholly upon his ownership of the land, he must show, in order to recover, that he or his grantors obtained title from the general government. *Heinrichs v. Terrell*, 25.
2. ———: EVIDENCE OF TITLE: DEFECTIVE DEED. In an action for trespass on land, a deed which constitutes a necessary link in the chain of plaintiff's title is admissible in evidence, although the description of the premises is defective; for the defeat may be cured by other competent evidence. *Id.*
3. ASSAULT WITH REVOLVER NOT JUSTIFIED IN REMOVING MERE TRESPASSER. See Criminal Law, 32.

TRIAL BY JURY.

1. CONSTITUTIONAL RIGHT TO: LIMITATION OF THE GUARANTY IN CERTAIN CASES. See Constitutional Law, 1, 4; Intoxicating Liquors, 1.

TRIAL DE NOVO.

1. NOT ALLOWED ON APPEAL IN SUMMARY PROCEEDINGS. See Appeal, 9.
2. DOES NOT ALLOW ONE NOT APPEALING TO COMPLAIN. See Appeal, 5.
3. NOT GRANTED WHERE EVIDENCE IS WANTING. See Practice in Supreme Court, 14, 18.
4. CAUSE TRIABLE DE NOVO REMANDED IN INTEREST OF JUSTICE. See Practice in Supreme Court, 30.

TRUST.

1. ACCOUNTING FOR PROFITS: WHOLE TRANSACTION TO BE CONSIDERED. An action cannot be maintained against a trustee for the profits of a transaction, or series of transactions, until it is closed up, so that it may appear what the profits are; and where, upon the whole transaction, or series of transactions, the profits which have come into the hands of the trustee do not exceed the losses, no recovery can be had. So *held* under the facts of this case, for which see opinion. *Sutliff v. Brown*, 42.
2. PAYMENT TO TRUSTEE: BENEFICIARIES BOUND BY: FORM OF SIGNATURE TO RECEIPT. Where it fairly appears, from a receipt signed with the proper name only of one who was a trustee, that the money receipted for was received by her in her capacity as trustee, and not to her own use, and she had the legal right as trustee to receive and receipt for the money, *held* that the receipt was binding on the beneficiaries. *Thomasen v. Van Wyngaarden*, 687.
3. PAYMENT OF INTEREST TO TRUSTEE: RECEIPT FOR. One who holds in trust for others the legal title to a note and mortgage may receive and receipt for interest thereon before or after it is due, and a receipt given for a certain sum in full for interest to a named date will bind the beneficiaries. *Id.*
4. DRY TRUST: WHAT IS NOT: PAYMENT TO TRUSTEE DISCHARGES DEBTOR. Where the legal title to a note and mortgage is vested in one for the benefit of others, and it is made his duty to collect the interest and principal when they fall due, and to guard the interests of the beneficiaries, the trust is not a mere dry one, so called, and payments made upon the note and mortgage in good faith to the trustee will discharge the debt *pro tanto*, and be binding on the beneficiaries. *Id.*

USURY.

1. MORTGAGE FORECLOSURE: EVIDENCE. Upon consideration of the evidence in this case, *held* that the defense of usury was established, and the decree of the district court to that effect is affirmed. *Goodhue v. Tertshorn*, 408.

VENDOR AND VENDEE.

1. BREACH OF COVENANT: DAMAGES: EVIDENCE: FORMER JUDGMENT. Where defendant conveyed to plaintiff, with a covenant against incumbrances, property encumbered with a perpetual easement, and plaintiff sold to another, with like covenant, and that other sued plaintiff for a breach of his covenant, and recovered judgment for \$500, and plaintiff, in this action, sued defendant on his covenant for a like breach, *held* that the record of the judgment was not admissible in evidence for the purpose of proving the amount of damages to which plaintiff was entitled; because the breach in each case was contemporaneous with the covenant, and the covenants were of different dates and the damages in each case had to be computed with reference to the time of the breach, and the market value of the property at that time. *Myers v. Munson*, 423.

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2. ———: ———: ATTORNEY'S FEES. In such case plaintiff was not entitled to recover what he had paid for attorney's fees in defending against the action brought against him for a breach of his covenant, notwithstanding he had notified defendant of the first action, and requested him to defend therein, and he failed so to do. *Id.*
3. WHEN VENDEE NOT BOUND BY ADJUDICATION AGAINST VENDOR. See Former Adjudication, 1.
4. AS TO SALES OF PERSONAL PROPERTY. See Sale.
See VENDOR'S LIEN.

VENDOR'S LIEN.

1. JUDGMENT: PRIORITY. The lien of a judgment takes precedence of a prior vendor's lien, where the judgment is taken without notice, actual or constructive, of the vendor's lien. *Culler v. Ammon*, 281.
2. FACTS ENTITLING TO: CONSPIRACY TO CHEAT VENDOR. Plaintiff sold defendants a farm for the consideration of \$1,600, of which \$600 was paid in cash, and for the residue of which defendants were to convey to him certain village property, valued at \$1,000. But at plaintiff's suggestion, defendants, for the time being, retained the legal title to the village property, but gave to plaintiff a bond for a deed therefor. Afterwards, through a conspiracy with another, (for the facts see opinion,) and by fraudulent representations as to the value of a certain railroad bond of the face value of \$1,000, defendants induced plaintiff to accept the bond, which proved to be worthless, in lieu of a deed for the village property. *Held* that the last transaction did not amount to a sale of the village property to defendants, but only to an agreement to accept the bond, instead of a deed to the village property, in part payment for the farm, and that, the bond being worthless, and having been imposed upon plaintiff by the fraud of defendants, it did not amount to a payment on the farm, and that plaintiff was entitled to have a vendor's lien established on the farm for the \$1,000. Compare *McDole v. Purdy*, 23 Iowa, 277. *Brown v. Byam*, 374.

VENUE.

1. CHANGE TO COUNTY OF DEFENDANT'S RESIDENCE: FACTS NOT ENTITLING TO. Where one is sued upon a contract in a county of which he is not a resident, along with other defendants who are residents of that county, he cannot have the cause removed to the county of his residence, under section 2587 of the Code, on the ground that plaintiff has failed to obtain judgment against the other defendants, so long as the right to a judgment against such other defendants remains undetermined. *McAlister v. Safley*, 719.
2. APPEAL FROM JUSTICE OF PEACE: CHANGE FROM CIRCUIT COURT: TO WHAT COURT TAKEN. A change of venue from the county is not allowed in cases appealed from justices' courts to the circuit court. (Code, § 2590, sub-div. 5, as amended by chapter 118, Laws of 1873.) Hence, in this case, where a motion for a change was made by defendant on account of the alleged prejudice of the circuit judge, and the application also alleged like prejudice on the part of the district judge of the county, and the circuit court gave defendant its election to take a change to the district court of the county, which was refused, *held* that the motion was properly overruled. [But see *Schuchart v. Lamme*, 62 Iowa, 197, where it is held that the district court has no jurisdiction, even upon a change of venue, of a civil cause appealed from a justice of the peace.—REPORTER.] *Ardery v. Chicago, B. & Q. R'y Co.*, 723.

3. CHANGE OF IN CRIMINAL CASE BEFORE JUSTICE: AFFIDAVIT FOR: CODE, § 4671, CONSTRUED. See Criminal Law, 1.
4. CHANGE OF IN CRIMINAL CASE: PREJUDICE OF JUDGE: DISCRETION OF COURT: EVIDENCE. See Criminal Law, 4, 36.

VERDICT.

1. THERE CAN BE NO SPECIAL VERDICT IN A CRIMINAL CASE. See Criminal Law, 21.
2. SPECIAL VERDICT AGAINST EVIDENCE: GROUND FOR NEW TRIAL. See New Trial, 4.
3. NOT DISTURBED IN SUPREME COURT WHERE EVIDENCE IS CONFLICTING. See Practice in Supreme Court, 12, 24, 25.

VOLUNTARY CONVEYANCE.

1. FROM FATHER TO DAUGHTER: NOTICE OF PRIOR EQUITIES: PURCHASE OF TAX TITLE BY DAUGHTER: SUBJECTING PROPERTY TO FATHER'S DEBTS. Where a daughter, without any consideration, but with no fraudulent intent, took from her father a conveyance of land, with knowledge of her father's indebtedness, she could not hold it free from liability to her father's creditors. But where the land was afterwards sold for taxes, and deeded to a *bona fide* purchaser, who deeded the same to the daughter, *held* that the title so obtained could not be assailed by the creditors of the father. *Mast & Co. v. Henry*, 193.

See FRAUDULENT CONVEYANCE.

WARRANTY.

1. FAILURE OF: CHOICE OF REMEDIES: DAMAGES: EVIDENCE. See Sale, 4, 5.
2. WARRANTY OF GOODS ON SALE: FACTS CONSTITUTING. See Sale, 9, 14.

WILL.

1. CONSTRUCTION: LIFE-ESTATE OR FEE-SIMPLE. The following language used in a will: "I will, devise and bequeath all the residue of my estate to my wife, Cynthia A. T.; that is to say, subject to the payment of my debts, and legacies heretofore named to the children of my first wife, Hannah T., deceased. I give and devise to my present wife, Cynthia A., all my estate, and all of which I may die seized or possessed, to be by her held, owned and possessed during her natural life; and at her death it is my will, wish and desire that it shall descend to her own children, S. S. T. and A. T., share and share alike; and I hereby will and bequeath it to them, subject to the devise hereinbefore made to my said wife Cynthia A., and subject to all just rights by virtue of such devise,"—*held* to give to Cynthia A. only a life-estate in the property. *Lowrie, Bowman & Boyer v. Ryland & Troutman*, 584.
2. CONSPIRACY TO BREAK: CONSIDERATION FOR VOID, AS BEING AGAINST PUBLIC POLICY. See Contract, 9.

WITNESS.

1. IMPEACHMENT FOR BAD MORAL CHARACTER. See Evidence, 1, 2.
2. RIGHT TO FEES IN ADVANCE. See Garnishment, 4.
3. AS TO EXPERTS IN CERTAIN CASES. See Evidence, 6, 16.

WORDS AND PHRASES.

1. "REASONABLE DOUBT." See Criminal Law, 15.
2. "DRUNKENNESS." See Criminal Law, 12.
3. "STOCK," WHEN USED IN REFERENCE TO LIVE STOCK, INCLUDES SWINE.
See Criminal Law, 24.
4. "HEIRS," WHO ARE: CODE, § § 2337, 2454. See Estates of Decedents, 2.
5. "PROBATE" DEFINED. See Guardian and Ward, 3.

Ex. G. A. A.



